

No. 15230

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United States  
Court of Appeals  
for the Ninth Circuit

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MORGAN STIVERS,

Appellant,

vs.

NATIONAL AMERICAN INSURANCE COM-  
PANY, a Corporation, et al.,

Appellees.

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Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California  
Central Division

FILED

DEC - 3 1956



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Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellee:

AUGUSTUS CASTRO and

FRANK D. TATUM,

333 Montgomery Street,  
San Francisco 4, California.



In the Superior Court of the State of California  
in and for the County of Los Angeles

No. Lb. C. 21,601

MORGAN A. STIVERS,

Plaintiff,

vs.

NATIONAL AMERICAN INSURANCE COM-  
PANY, a Corporation; GIRARD INSUR-  
ANCE COMPANY OF PHILADELPHIA,  
PENNSYLVANIA, a Corporation; THE IN-  
SURANCE COMPANY OF THE STATE OF  
PENNSYLVANIA, a Corporation; QUEEN  
INSURANCE COMPANY OF AMERICA, a  
Corporation, and DOES I TO X, Inclusive,  
Defendants.

### COMPLAINT

(Damages, Breach of Contract)

Plaintiff for cause of action against Defendants,  
who are joined as Defendants pursuant to Section  
383 of California Code of Civil Procedures, alleges  
as follows:

For a First Cause of Action

#### I.

Plaintiff, Morgan A. Stivers, is now and at all  
times herein mentioned was the owner and sole  
proprietor of Stivers Packing Company located at  
Sides Station, three miles north of Lindsay, Tulare  
County, California.

## II.

That at all times hereafter stated, the Defendant, National American Insurance Company, was and now is an insurance [13\*] corporation organized and existing under the laws of a State other than California, and said Defendant, National American Insurance Company, now is and has been at all times herein mentioned licensed to transact fire insurance business in the State of California.

## III.

That at all times herein mentioned Truman B. Stivers and the General Adjustment Bureau, Inc., a corporation, were the duly authorized agents, servants and employees of the Defendant, National American Insurance Company.

## IV.

That at the time of making said insurance as hereinafter described and until the fire hereinafter mentioned, the Plaintiff was the owner in fee of the property so insured and described as packing house and loading platform, bunk house and storage building, and the machinery, equipment, field supplies and boxes situated therein located at Sides Station three miles north of Lindsay, Tulare County, California.

## V.

That on or about the 18th day of November, 1952, at Pasadena, California, in consideration of pay-

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\*Page numbering appearing at foot of page of original Certified Transcript of Record.

ment by the Plaintiff to the Defendant, National American Insurance Company, of the premium of \$261.00, the Defendant, National American Insurance Company, made and issued its policy of insurance in writing entitled California Standard Form Fire Insurance Policy, No. 70997, a copy of which is annexed and made a part of this complaint and marked Exhibit "A" and thereby insured the Plaintiff against loss or damage by fire to the amount of \$10,000.00, as follows: Packing house and loading platform in the amount of \$5,000.00; stock consisting principally of field supplies and boxes in the amount of \$1,500.00, bunk house in the amount of \$2,000.00, and storage building in the amount of \$1,500.00. Said policy was delivered [14] to the Plaintiff at Long Beach, California; and loss, if any, to be paid by said Defendant under said policy was made payable to the named insured at Long Beach, California.

## VI.

That on the 13th day of October, 1954, and while said policy was still in force, said packing house and loading platform, equipment, field supplies and boxes, and storage building situated on the afore-said premises were totally destroyed by fire.

## VII.

That the Plaintiff's loss thereby was \$166,642.00, as follows: Packing house and loading platform in the amount of \$65,000.00; equipment in the amount of \$67,242.00; stock, including field supplies and

boxes, in the amount of \$25,150.00, and storage buildings in the amount of \$9,250.00.

### VIII.

That on or about the 16th day of December, 1954, the Defendant National American Insurance Company, by its agent duly authorized thereto, waived the condition of said policy by which proofs of loss were required to be presented within sixty (60) days of said loss and extended the time for filing said proofs of loss to and including the 15th day of January, 1955; that thereafter on or about the 21st day of December, 1954, Plaintiff furnished the Defendant, National American Insurance Company, proofs of his said loss and interest; that said Defendant, National American Insurance Company, estopped itself from objecting to the contents of said proofs of loss so furnished by the Plaintiff by retaining same without objection thereto and by refusal to pay the Plaintiff any sum whatever.

### IX.

That the Plaintiff duly fulfilled all of the conditions of said policy of insurance on his part. [15]

### X.

That under the terms of said policy, other insurance concurrent therewith was permitted; that Plaintiff had other fire insurance upon said property at the time of said fire, and that the aggregate thereof, including the insurance by the Defendant, National American Insurance Company, was in the



amount of \$40,000.00, as follows: Packing house and loading platform in the sum of \$18,000.00; equipment in the sum of \$12,500.00; stock, including field supplies and boxes, in the sum of \$5,000.00; storage building and bunk house in the sum of \$4,500.00; that Defendant's proportionate liability for said loss and damage to Plaintiff is the sum of at least \$8,000.00.

XI.

That the Defendant, National American Insurance Company, has not paid the said loss nor any part thereof, and the same is now due from the Defendant to the Plaintiff.

For a Second Cause of Action

I.

Plaintiff realleges the allegations of Paragraphs I, II, III, IV, V, VI, VII, VIII, X and XI of the First Cause of Action as fully as though set forth at length.

II.

That Plaintiff duly fulfilled all of the conditions of said policy of insurance on his part, except that the Defendant, National American Insurance Company, at the time of the issuance of said policy thereto, waived the condition of said policy by which said insurance was forfeited if said premises were permitted to remain unoccupied but not vacant in excess of ten consecutive months, and released and discharged the Plaintiff from the performance thereof, and consented that the Plaintiff maintain

a watchman on said premises insured by said policy in lieu of continuous [16] occupancy beyond ten consecutive months; that pursuant to said agreement of said Defendant, National Insurance Company, the Plaintiff hired and maintained a watchman on said premises at all times after the issuance of said policy and until said property was destroyed by fire.

### For a Third Cause of Action

#### I.

Plaintiff realleges the allegations of Paragraphs I, III, IV, VI and VII of the First Cause of Action as fully as though set forth at length.

#### II.

That at all times hereafter stated, the Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, was and now is an insurance corporation organized and existing under the laws of a State other than California, and said Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, now is and has been at all times herein mentioned licensed to transact fire insurance business in the State of California.

#### III.

That on or about the 1st day of December, 1952, at Pasadena, California, in consideration of payment by the Plaintiff to the Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, made and issued its policy of insurance in writing entitled said policy of insurance issued by said De-

fendant was substantially identical in form to Exhibit "A" attached hereto, except as to the name of the issuing company, the number of the policy, the gross premium, the amount of the insurance, the issuing agent, the inclusion of Raymond K. Stivers as a named insured, and the fact a Lenders Loss Payable Endorsement was attached thereto; that by the issuance of said policy the Defendant insured the [17] Plaintiff against loss or damage by fire to the amount of \$10,000.00, as follows: Packing house and loading platform in the amount of \$5,000.00 and equipment in the amount of \$5,000.00. Said policy was delivered to the Plaintiff at Long Beach, California; and loss, if any, to be paid by said Defendant under said policy was made payable to the named insured at Long Beach, California.

#### IV.

That said policy of insurance so issued by said Girard Insurance Company of Philadelphia, Pennsylvania, was issued to renew or replace Policy No. 102 theretofore issued by said Girard Insurance Company of Philadelphia, Pennsylvania; that by mutual mistake of the parties said policy was made to read in part: "Does insure Morgan A. Stivers and Raymond K. Stivers, doing business as Stivers Packing Company"; that in truth and in fact, said policy should have read: "Does Insure Morgan A. Stivers, Doing Business as Stivers Packing Company"; that prior to the issuance of said renewal policy sued on herein, all right, title and interest of the said Raymond K. Stivers in said premises

had been assigned to and acquired by Morgan A. Stivers, Plaintiff herein. Plaintiff prays that the Court reform said policy by striking therefrom the name of Raymond K. Stivers as a person insured under the said policy.

## V.

That at the time said policy of insurance was issued there was appended thereto a Lenders Loss Payable Endorsement, providing that loss or damage, if any, under said policy shall be paid to the Farmers & Merchants Bank of Long Beach; that prior to the issuance of said renewal policy all interest of the said Farmers & Merchants Bank of Long Beach as lender, or otherwise, was paid in full; that said Farmers & Merchants Bank of Long Beach by endorsement in writing on said Lenders Loss Payable Endorsement [18] have released any and all interest in said policy.

## VI.

That on or about the 16th day of December, 1954, the Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, by its agent duly authorized thereto, waived the condition of said policy by which proofs of loss were required to be presented within sixty (60) days of said loss and extended the time for filing said proofs of loss to and including the 12th day of January, 1955; that thereafter on or about the 21st day of December, 1954, Plaintiff furnished the Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, proofs of his said loss and interest; that said

Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, has estopped itself from objecting to the contents of said proofs of loss so furnished by the Plaintiff by retaining same without objection thereto and by refusal to pay the Plaintiff any sum whatever.

#### VII.

That the Plaintiff duly fulfilled all of the conditions of said policy of insurance on his part.

#### VIII.

That under the terms of said policy, other insurance, concurrent therewith was permitted; that Plaintiff had other fire insurance upon said property at the time of said fire, and that the aggregate thereof, including the insurance by the Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, was in the sum of \$40,000.00, as follows: Packing house and loading platform in the sum of \$18,000.00; equipment in the sum of \$12,500.00; stock, including field supplies and boxes, in the sum of \$5,000.00; storage building and bunk house in the sum of \$4,500.00; that Defendant's proportionate liability for said loss and damage to Plaintiff is the sum of at least \$10,000.00. [19]

#### IX.

That the Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, has not paid the said loss nor any part thereof, and the same is now due from the defendant to the Plaintiff.

## For a Fourth Cause of Action

## I.

Plaintiff realleges the allegations of Paragraphs I, III, IV, VI and VII of Plaintiff's First Cause of Action as fully as though set forth at length.

## II.

Plaintiff realleges the allegations of Paragraphs II, III, IV, V, VI, VIII and IX of Plaintiff's Third Cause of Action as fully as though set forth at length.

## III.

That Plaintiff duly fulfilled all of the conditions of said policy of insurance on his part, except that the Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, by its agents duly authorized thereto, waived the condition of said policy by which said insurance was forfeited if said premises were permitted to remain unoccupied but not vacant in excess of ten consecutive months, and released and discharged the Plaintiff from the performance thereof, and consented that the Plaintiff maintain a watchman on said premises insured by said policy in lieu of continuous occupancy beyond ten consecutive months; that pursuant to said agreement of said Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, the Plaintiff hired and maintained a watchman on said premises at all times after the issuance of said policy and until said property was destroyed by fire. [20]

For a Fifth Cause of Action

I.

Plaintiff realleges the allegations of Paragraphs I, IV, VI and VII of Plaintiff's First Cause of Action as fully as though set forth at length.

II.

That at all times hereafter stated, the Defendant, The Insurance Company of the State of Pennsylvania, was and now is an insurance corporation organized and existing under the laws of a State other than California, and said Defendant, The Insurance Company of the State of Pennsylvania, now is and has been at all times herein mentioned licensed to transact fire insurance business in the State of California.

III.

That at all times herein mentioned Truman B. Stivers, Roy A. McMillan and The General Adjustment Bureau, Inc., a corporation, were the duly authorized agents, servants and employees of the Defendant, The Insurance Company of the State of Pennsylvania.

IV.

That on or about the 1st day of December, 1952, at Altadena, California, in consideration of payment by the Plaintiff to the Defendant, The Insurance Company of the State of Pennsylvania, of the premium of \$243.75, the Defendant, The Insurance Company of the State of Pennsylvania, made and issued its policy of insurance in writing entitled

California Standard Form Fire Insurance Policy, No. 101260, which said policy of insurance issued by said Defendant was substantially identical in form to Exhibit "A" attached hereto, except as the name of the issuing company, the number of the policy, the gross premium, the amount of the insurance, the issuing agent, and the fact a Lenders Loss Payable Endorsement was attached thereto; that by the issuance of said [21] policy the Defendant insured the Plaintiff against loss or damage by fire to the amount of \$7,500.00, as follows: Packing house and loading platform in the amount of \$3,000.00; equipment in the amount of \$2,500.00; stock, consisting principally of field supplies and boxes, in the amount of \$1,500.00, and storage buildings in the amount of \$500.00. Said policy was delivered to the Plaintiff at Long Beach, California; and loss, if any, to be paid by said Defendant under said policy was made payable to the named insured at Long Beach, California.

#### V.

That at the time said policy of insurance was issued there was appended thereto a Lenders Loss Payable Endorsement, providing that loss or damage, if any, under said policy shall be paid to the Farmers & Merchants Bank of Long Beach; that prior to the issuance of said policy all interest of the said Farmers & Merchants Bank of Long Beach, as Lender, or otherwise, was paid in full; that said Farmers & Merchants Bank of Long Beach by en-



dorsement on said Lenders Loss Payable Rider have released any and all interest in said policy.

#### VI.

That on or about the 13th day of December, 1954, the Defendant, The Insurance Company of the State of Pennsylvania, by its agent duly authorized thereto, waived the condition of said policy by which proofs of loss were required to be presented within sixty (60) days of said loss and extended the time for filing said proofs of loss to and including the 12th day of January, 1955; that thereafter on or about the 21st day of December, 1954, Plaintiff furnished the Defendant, The Insurance Company of the State of Pennsylvania, proofs of his said loss and interest; that said Defendant, The Insurance Company of the State of Pennsylvania, estopped itself from objecting to the contents of said proofs of loss so furnished by the Plaintiff by retaining [22] same without objection thereto and by refusal to pay the Plaintiff any sum whatever.

#### VII.

That the Plaintiff duly fulfilled all of the conditions of said policy of insurance on his part.

#### VIII.

That under the terms of said policy, other insurance concurrent therewith was permitted; that Plaintiff had other fire insurance upon said property at the time of said fire, and that the aggregate thereof, including the insurance by the Defendant,

The Insurance Company of the State of Pennsylvania, was in the sum of \$40,000.00, as follows: Packing house and loading platform in the sum of \$18,000.00; equipment in the sum of \$12,500.00; stock, including field supplies and boxes, in the sum of \$5,000.00; storage building and bunk house in the sum of \$4,500.00; that Defendant's proportionate liability for said loss and damage to Plaintiff is the sum of at least \$7,500.00.

### IX.

That the Defendant, The Insurance Company of the State of Pennsylvania, has not paid the said loss nor any part thereof, and the same is now due from the Defendant to the Plaintiff.

### For a Sixth Cause of Action

#### I.

Plaintiff realleges the allegations of Paragraphs I, IV, VI and VII of Plaintiff's First Cause of Action as fully as though set forth at length.

#### II.

Plaintiff realleges the allegations of Paragraphs II, III, IV, V, VI, VIII and IX of Plaintiff's Fifth Cause of Action as fully as though set forth at length. [23]

#### III.

That Plaintiff duly fulfilled all of the conditions of said policy of insurance on his part, except that the Defendant, The Insurance Company of the State of Pennsylvania, by its agents duly authorized

thereto, waived the condition of said policy by which said insurance was forfeited if said premises were permitted to remain unoccupied but not vacant in excess of ten consecutive months, and released and discharged the Plaintiff from the performance thereof, and consented that the Plaintiff maintain a watchman on said premises insured by said policy in lieu of continuous occupancy beyond ten consecutive months; that pursuant to said agreement of said Defendant, The Insurance Company of the State of Pennsylvania, the Plaintiff hired and maintained a watchman on said premises at all times after the issuance of said policy and until said property was destroyed by fire.

### For a Seventh Cause of Action

#### I.

Plaintiff realleges the allegations of Paragraphs I, IV, VI and VII of Plaintiff's First Cause of Action as fully as though set forth at length.

#### II.

That at all times hereafter stated, the Defendant, Queen Insurance Company of America, was and now is an insurance corporation organized and existing under the laws of a State other than California, and said Defendant, Queen Insurance Company of America, now is and has been at all times herein mentioned licensed to transact fire insurance business in the State of California.

## III.

That at all times herein mentioned, Truman B. Stivers, Roy A. McMillan and The General Adjustment Bureau, Inc., a [24] corporation, were the duly authorized agents, servants and employees of the Defendant, Queen Insurance Company of America.

## IV.

That on or about the 1st day of December, 1952, at Altadena, California, in consideration of payment by the Plaintiff to the Defendant, Queen Insurance Company of America, of the premium of \$406.25, the Defendant, Queen Insurance Company of America, made and issued its policy of insurance in writing entitled California Standard Form Fire Insurance Policy, No. 764197, which said policy of insurance issued by said Defendant was substantially identical in form to Exhibit "A" attached hereto, except as to the name of the issuing company, the number of the policy, the gross premium, the amount of the insurance, the issuing agent, and the fact a Lenders Loss Payable Endorsement was attached thereto; that by the issuance of said policy the Defendant insured the Plaintiff against loss or damage by fire to the amount of \$12,500.00, as follows: Packing house and loading platform in the amount of \$5,000.00; equipment in the amount of \$5,000.00; stock, consisting principally of field supplies and boxes, in the amount of \$2,000.00, and storage building in the amount of \$500.00. Said policy was delivered to the Plaintiff at Long Beach, California; and loss, if

any, to be paid by said Defendant under said policy was made payable to the named insured at Long Beach, California.

## V.

That at the time said policy of insurance was issued there was appended thereto a Lenders Loss Payable Endorsement, providing that loss or damage, if any, under said policy shall be paid to the Farmers & Merchants Bank of Long Beach; that prior to the issuance of said policy all interest of the said Farmers & Merchants Bank of Long Beach as Lender, or otherwise, was paid in full; that said Farmers & Merchants Bank of Long Beach by endorsement on said Lenders Loss Payable Rider have released any and all interest [25] in said policy.

## VI.

That on or about the 13th day of December, 1954, the Defendant, Queen Insurance Company of America, by its agent duly authorized thereto, waived the condition of said policy by which proofs of loss were required to be presented within sixty (60) days of said loss and extended the time for filing said proofs of loss to and including the 12th day of January, 1955; that thereafter on or about the 21st day of December, 1954, Plaintiff furnished the Defendant, Queen Insurance Company of America, proofs of his said loss and interest; that said Defendant, Queen Insurance Company of America, estopped itself from objecting to the contents of said proofs of loss so furnished by the Plaintiff by retaining same without objection

thereto and by refusal to pay the Plaintiff any sum whatever.

#### VII.

That the Plaintiff duly fulfilled all of the conditions of said policy of insurance on his part.

#### VIII.

That under the terms of said policy, other insurance concurrent therewith was permitted; that Plaintiff had other fire insurance upon said property at the time of said fire, and that the aggregate thereof, including the insurance by the Defendant, Queen Insurance Company of America, was in the sum of \$40,000.00, as follows: Packing house and loading platform in the sum of \$18,000.00; equipment in the sum of \$12,500.00; stock, including field supplies and boxes, in the sum of \$5,000.00; storage building and bunk house in the sum of \$4,500.00; that Defendant's proportionate liability for said loss and damage to Plaintiff is the sum of at least \$12,500.

#### IX.

That the Defendant, Queen Insurance Company of America, has not paid the said loss nor any part thereof, and the same is [26] now due from the Defendant to the Plaintiff.

For an Eighth Cause of Action

#### I.

Plaintiff realleges the allegations of Paragraphs I, IV, VI and VII of Plaintiff's First Cause of Action as fully as though set forth at length.

II.

Plaintiff realleges the allegations of Paragraphs II, III, IV, V, VI, VIII and IX of Plaintiff's Seventh Cause of Action as fully as though set forth at length.

III.

That Plaintiff duly fulfilled all of the conditions of said policy of insurance on his part, except that the Defendant, Queen Insurance Company of America, by its agents duly authorized thereto, waived the condition of said policy by which said insurance was forfeited if said premises were permitted to remain unoccupied but not vacant in excess of ten consecutive months, and released and discharged the Plaintiff from the performance thereof, and consented that the Plaintiff maintain a watchman on said premises insured by said policy in lieu of continuous occupancy beyond ten consecutive months; that pursuant to said agreement of said Defendant, Queen Insurance Company of America, the Plaintiff hired and maintained a watchman on said premises at all times after the issuance of said policy and until said property was destroyed by fire.

Wherefore, Plaintiff prays judgment, as follows:

1. Against the Defendant, National American Insurance Company, on the First and Second Causes of Action, damages in the sum of \$8,000.00, plus interest from December 21, 1954;

2. Against the Defendant, Girard Insurance Company of [27] America, on the Third and Fourth Causes of Action, as follows:

a. That the Court reform said policy of insurance as prayed for in Paragraph IV of the Third Cause of Action; and

b. For damages in the sum of \$10,000.00, plus interest from December 21, 1954;

3. Against the Defendant, The Insurance Company of the State of Pennsylvania, on the Fifth and Sixth Causes of Action, damages in the sum of \$7,500.00, plus interest from December 21, 1954;

4. Against the Defendant, Queen Insurance Company of America, on the Seventh and Eighth Causes of Action, damages in the sum of \$12,500.00, plus interest from December 21, 1954; and

5. Against all Defendants, costs of suit and such other and further relief as to the Court may seem just.

HARWOOD STUMP,  
Attorney for Plaintiff.

Duly verified.

Complaint amended January 19, 1956. [28]



EXHIBIT "A"

California Standard Form Fire Insurance Policy  
National American Insurance Company  
Omaha, U.S.A.

Insurance Managers, Incorporated  
H. F. Ahmanson & Company  
704 S. Spring St., Los Angeles

Morgan A. Stivers, et al.

Buildings & Equipment, Description of Property  
Property Located at Sides Station, 3 Miles North  
of Lindsay, Tulare County, California

Policy No. 70997

Policy Commences: 12-1-52

Policy Expires: 12-1-55

For the Term of: 3 Yrs.

In the Amount of: 10,000.00

Rate: Vrs.

Premium: 261.00

California Standard Form Fire Insurance Policy  
Stock Company

Date Issued: 11-18-52 RK

No. 70997

Old No.: .....

National American Insurance Company  
Omaha, U.S.A.

Pacific Department

Los Angeles, California

## Tentative

Fire & Lighting, Amount: \$10,000.00

Fire Rate: Various

Premium: \$216.00

Extended Coverage Rate: Various

Premium: \$45.00

Total Premium: \$261.00

Insurance is provided only against those perils and for only those coverages indicated above by a premium charge and against other perils and for other coverages when endorsed hereon or added hereto.

In Consideration of the Provisions and Stipulations Herein or Added Hereto and of the Above Specified Dollars Premium this Company, for the term of 3 Years from the 1st day of December, 1952, to the 1st day of December, 1955, at noon, Standard Time, at location of property involved, to an amount not exceeding the above specified dollars, does insure Morgan A. Stivers, Doing Business as Stivers Packing Co., and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all Loss by Fire, Lightning and by Removal

From Premises Endangered by the Perils Insured Against in This Policy, Except as Hereinafter Provided, to the property described hereinafter while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

In Witness Whereof, this company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized agent of this company at any place in California.

/s/ RAY F. STRYKER,  
Secretary;

/s/ H. F. AHMANSON,  
Chairman of the Board.

Countersigned at Pasadena, California, this 18th day of November, 1952.

/s/ TRUMAN B. STIVERS,  
Agent.

Standard Forms Bureau Form 78 (July, 1950)

Building, Equipment and Stock Form

Attached to and forming part of Policy No. 70997  
of the National American Insurance Company.

Issued to Morgan A. Stivers, et al.

Agency at: Pasadena, California.

Dated: December 1, 1952.

This policy covers the following described property, all situated at Sides Station, 3 Miles North of Lindsay, California, Tulare County, State of California.

Item 1. \$5,000.00 On the . . . . . story Comp. roof Frame Building while occupied as Packing House and Loading Platform.

2.00/.45

Item 2. \$ Nil. On Equipment, pertaining to Insured's occupancy as . . . . . all only while contained in, on or attached to the above described building.

Item 3. \$1,500.00 On Stock, consisting principally of Field Supplies and Boxes, all only while contained in, on or attached to the above described building.

2.00/.45

Item 4. \$2,000.00 On Bunk House Situate: On Above Described Premises.

2.80/.45

Item 5. \$1,500.00 On Storage Building Situate: On Above Described Premises.

2.00/.45

6. Insurance attaches hereunder only to those items for which an amount is shown in the space provided therefore and not exceeding said amount under such item(s). For definition of terms "Building," "Equipment," "Stock," see Paragraph 7 below; for extensions and exclusions see Paragraphs Nos. 8 and 10 below.

7. Definition of Terms:

(I) Building: Building or structure in its entirety, including all fixtures and machinery used for the service of the building itself, provided such fixtures and machinery are contained in or attached to and constitute a part of the building; additions in contact therewith; platforms, chutes, conveyors, bridges, trestles, canopies, gangways, and similar exterior structures attached thereto and located on the above described premises, provided, that if the same connect with any other building or structure owned by the named Insured, then the insurance shall cover only such portion of the same situate on the above described premises as lies between the building covered under this policy and a point midway between it and such other building or structure; also (a) awnings, signs, door and window shades and screens, storm doors and storm windows; (b) cleaning and fire fighting apparatus; (c) janitors' supplies, tools and implements; (d) materials and supplies intended for use in construction, alterations or repairs of the building. Provided, however, that property described in (a), (b), (c) and (d) immediately above must be, at the time

of any loss, (1) the property of the named Insured who is the owner of the building; and (2) used for the maintenance or service of the building; and (3) contained in or attached to the building; and (4) not specifically covered under an item other than the "Building" item of this or any other policy.

(II) Equipment: Equipment and personal property of every description, and, provided the described building is not owned by the named Insured. "Tenant's Improvements and Betterments" installed or paid for by the named Insured; But Excluding, (1) Bullion, Manuscripts, and Machine Shop or Foundry Patterns, (2) Property (Whether Covered Under This Policy or Not) Included Within the Description or Definition of "Stock," (3) Property Kept for Sale, and (4) Property Covered Under the "Building" Item of This or Any Other Policy.

(III) Stock: Stock of goods, wares and merchandise of every description, manufactured, unmanufactured, or in process of manufacture; materials and supplies which enter in the manufacture, packing, handling, shipping and sale of same; advertising material; all being the property of the named Insured, or sold but not removed (it being understood that the actual cash value of stock sold but not removed shall be the Insured's selling price); and the Insured's interest in materials, labor and charges furnished, performed on or incurred in connection with the property of others.

8. Extension Clause: Personal property of the

kind and nature covered under any item hereof shall be covered under the respective item (a) while in, on, or under sidewalks, streets, platforms, alleyways or open spaces, provided such property (1) is located within fifty (50) feet of the described "Building," or (2) in the case of materials and supplies intended for use in construction, alterations or repairs of the described "Building," is located within one hundred (100) feet of said "Building"; and (b) while in or on cars and vehicles within three hundred (300) feet of the described "Building"; and (c) while in or on barges and scows or other vessels within one hundred (100) feet of the described premises. Provided That Property Covered by Marine, Inland Marine or Transportation Insurance of Any Kind, Shall Not Be Covered Under This Extension Clause.

9. Trust and Commission Clause: To the extent that the named Insured shall be liable by law for loss thereto or shall prior to loss have specifically assumed liability therefor, any item of this policy covering on personal property shall also cover property of the kind and nature described in such item, at the location(s) herein indicated, held in trust, or on consignment or commission, or on joint account with others, or left for storage or repairs.

10. Exclusion Clause: In Addition to Property Expressly Excluded From Coverage by Any Provision of This Form or Other Endorsement Attached to This Policy, the Following Are Not Covered Under Any Item of This Policy and Are

to Be Excluded in the Application of Any "Average Clause" or "Distribution Clause": Land Values, Gardens, Trees, Lawns, Plants, Shrubbery, Accounts, Bills, Currency, Deeds, Evidences of Debt, Money, Securities, Aircraft, Boats, Motor Vehicles.

Extended Coverage Endorsement, SFBF 202,  
Attached

11. Loss, if any, under each item of this policy shall be adjusted with the Insured specifically named unless otherwise specified, (a) hereunder, (b) by written agreement, or (c) by endorsement hereon.

12. Loss, if any, under item(s) 1, 3, 4, 5 subject to all the terms and conditions of this policy, and to the written agreement, if any, between this Insurer and the following named Payee, is payable to Named Insured, whose mailing address is.....  
.....

13. Average Clause (This Clause Void Unless Percentage Is Inserted): In Event of Loss to Property Described in Any Item of This Policy as to Which Item a Percentage Figure Is Inserted in This Clause, This Company Shall Be Liable for No Greater Proportion of Such Loss Than the Amount of Insurance Specified in Such Item Bears to the Following Percentage of the Actual Cash Value of the Property Described in Such Item at the Time of Loss, Nor for More Than the Proportion Which the Amount of Insurance Specified in Such Item



Bears to the Total Insurance on the Property Described in Such Item at the Time of Loss:

Per Cent (.....) Applying to Item No. ....

Per Cent (.....) Applying to Item No. ....

If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately.

14. Waiver of Inventory and Appraisalment Clause: If any item of this policy is subject to the conditions of the Average Clause (Paragraph 13 hereof), it is also provided that when an aggregate claim for any loss to the property described in any such item of this policy is both less than Five Thousand Dollars (\$5,000.00) and less than two per cent (2%) of the total amount of insurance upon the property described in .... at the time such loss .... it shall not be necessary for the Insured to make a special inventory or appraisalment of the undamaged property, But Nothing Herein Contained Shall Operate to Waive the Application of the Average Clause to Any Such Loss.

If this policy be divided into two or more items, the foregoing condition shall apply to each item separately.

The Provisions Printed on the Back of This Form Are Hereby Referred to and Made a Part Hereof.

/s/ TRUMAN B. STIVERS.

Provisions Referred to in and Made  
Part of This Form (No. 70)

15. Excess Insurance Limitation Clause: No Item of This Policy Shall Attach to or Become Insurance Upon Any Property, Included Within the Description of Such Item, Which at the Time of Any Loss

(a) Is More Specifically Described and Covered Under Another Item of This Policy, or Under Any Other Policy Carried by or in the Name of the Insured Named Herein, or

(b) Being the Property of Others Is Covered by Insurance Carried by or in the Name of Others Than the Insured Named Herein, Until the Liability of Insurance Described Under (a) or (b) Has First Been Exhausted, and Shall Then Cover Only the Excess of Value of Such Property Over and Above the Amount Payable Under Such Other Insurance, Whether Collectible or Not. This Clause Shall Not Be Applicable to Property of Others for the Loss of Which the Insured Named Herein Is Liable by Law or Has Prior to Any Loss Specifically Assumed Liability.

16. Tenant's Improvements and Betterments Clause: "Tenant's Improvements and Betterments" (subject to the provisions of the paragraph hereof entitled "Equipment") are covered as property of the named Insured under the "Equipment" item of this policy, regardless of whether or not the same have or will become a permanent or integral part of the building(s) or the property of the building owner or lessor. The amount of loss on such "Ten-

ant's Improvements and Betterments" shall be determined on the basis of the actual cash value thereof at the time of loss, irrespective of any limitation upon the interest of the Insured therein resulting from any lease or rental agreement affecting the same. The insurance on such "Tenant's Improvements and Betterments" shall not be prejudiced, nor shall the amount recoverable for loss thereon be diminished, because of insurance covering on the same issued in the name of the owner of said building(s) or of others than the Insured named in this policy. This Policy, However, Shall Not Contribute to the Payment of Any Loss to "Tenants Improvements and Betterments" Covered Under Any Policy or Policies Issued in the Name of the Owner of Said Building(s) or of Others Than the Insured Named in This Policy.

17. Consequential Damage Assumption Clause: (To apply only if stock of merchandise, provisions or supplies in cold storage, which stock is subject to damage through change of temperature, are covered hereunder.) This Company (Subject to the Terms of This Policy) Shall Be Liable for Consequential Loss to Stock of Merchandise, Provisions and Supplies in Cold Storage Covered Hereunder Caused by Change of Temperature Resulting From Total or Partial Destruction by Any Peril Insured Against in This Policy, of Refrigerating or Cooling Apparatus, Connections or Supply Pipes Thereof, Unless Such Loss is Specifically Excluded as to Any Such Peril by Express Provisions of Any Form, Rider or Endorsement Attached to This Policy.

The Total Liability for Loss Caused by Any Peril Insured Against in This Policy and by Such Consequential Loss, Either Separately or Together, Shall in No Case Exceed the Total Amount of This Policy in Effect at the Time of Loss. If There Is Other Insurance Upon the Property Damaged Covering the Perils, or Any Thereof, Which Are Insured Against in This Policy, This Company Shall Be Liable Only for Such Proportion of Any Consequential Loss as the Amount Hereby Insured Bears to the Whole Amount of Insurance Thereon Whether Such Other Insurance Covers Against Consequential Loss or Not.

18. Breach of Warranty Clause: If a breach of any warranty or condition contained in any rider attached to or made a part of this policy shall occur, which breach by the terms of such warranty or condition shall operate to suspend or avoid this insurance, it is agreed that such suspension or avoidance due to such breach, shall be effective only during the continuance of such breach and then only as to the building, fire division, contents therein, or other separate location to which such warranty or condition has reference and in respect of which such breach occurs.

19. Subrogation Waiver Clause: This insurance shall not be prejudiced by agreement made by the named Insured releasing or waiving the named Insured's right of recovery against third parties responsible for the loss, under the following circumstances only:

I. If made before loss has occurred, such agreement may run in favor of any third party;

II. If Made After Loss Has Occurred, Such Agreement May Run Only in Favor of a Third Party Falling Within One of the Following Categories at the Time of Loss:

(a) A Third Party Insured Under This Policy; or

(b) A Corporation, Firm, or Entity (1) Owned or Controlled by the Named Insured or in Which the Named Insured Owns Capital Stock or Other Proprietary Interest, or (2) Owning or Controlling the Named Insured or Owning or Controlling Capital Stock or Other Proprietary Interest in the Named Insured;

III. Whether Made Before or After Loss Has Occurred, Such Agreement Must Release or Waive the Entire Right of Recovery of the Named Insured Against Such Third Party.

20. Automatic Reinstatement Clause: (a) Applying to Losses Not Exceeding Five Hundred Dollars (\$500.00) Under This Policy: The amount of insurance hereunder involved in a loss payment of Not More Than Five Hundred Dollars (\$500.00) for This Policy shall be automatically reinstated.

(b) Applying to Losses in Excess of Five Hundred Dollars (\$500.00) Under This Policy: In the event of any loss payment under this policy in excess of Five Hundred Dollars (\$500.00) the amount paid shall be deemed reinstated and this policy automatically reinstated to the full amount in force immediately preceding said loss. Provided That the

Policy Shall Be Endorsed to That Effect Within 30 Days After the Payment of Loss, and the Insured Shall Pay to the Company the Pro Rata Premium for the Unexpired Time From the Date of Said Loss to the Expiration of This Policy, at the Rate in Force at the Time of Said Reinstatement.

This clause shall apply to each loss separately.

21. Vacancy—Unoccupancy Clause: Permission is granted to remain vacant or unoccupied without limit of time, Except as Follows: (1) If the subject of insurance (whether building or contents or both) is a manufacturing or mining plant or a mill, permission is granted to remain vacant or unoccupied for not to exceed sixty (60) consecutive days; (2) If the subject of insurance (whether building or contents or both) is a cannery, fruit, nut or vegetable packing or processing plant, fish reduction plant, hop kiln, rice drier, beet sugar factory, cotton gin, cotton compress or cotton seed oil mill, permission is granted (a) to remain vacant for not to exceed sixty (60) consecutive days, and (b) to remain unoccupied But Not Vacant for not to exceed ten (10) consecutive months. Nothing herein contained shall be construed to abrogate or modify any provision or warranty of this policy requiring (1) the maintenance of watchman service; (2) the maintenance of all fire extinguishing appliances and apparatus including sprinkler system, and water supply therefor, and fire detecting systems, in complete working order; nor to extend the term of this policy.

22. Debris Removal Clause: Except as Herein Provided, this policy is extended to cover expenses incurred in the removal of all debris of the property covered hereunder which may be occasioned by loss caused by any of the perils insured against in this policy, Subject to the Following Limits of Liability:

Limits of Liability: This Company Shall Not Be Liable Under This Policy and This Clause for: (a) More Than the Actual Cash Value of the Building or Structure or Contents Thereof, as Covered Hereunder, Which Is Damaged or Destroyed; (b) More Than the Amount of Insurance Applying Under This Policy to the Property Damaged or Destroyed After Application of Any Co-insurance Average, Distribution, or Reduced Rate Contribution Clause Contained Herein; (c) Loss Occasioned by the Enforcement of Any State or Municipal Law or Ordinance Which Necessitates the Demolition of Any Portion of the Building Covered Hereunder Which Has Not Suffered Damage by Any of the Perils Insured Against in This Policy Unless Such Liability Is Specifically Assumed Elsewhere in the Policy: Nor (d) Any Greater Proportion of Such Expense Than the Amount of Insurance Hereunder Bears to the Total Amount of All Insurance Whether All Such Insurance Contains This Clause or Not.

This Clause Does Not Increase the Amount or Amounts of Insurance Provided in the Policy to Which It Is Attached.

If this policy is divided into two or more items,

the foregoing shall apply separately to each item to which this clause applies.

Cost of removal of debris shall not be considered in the determination of actual cash value when applying any Co-insurance. Average, Distribution, or Reduced Rate Contribution clause attached to this policy.

23. Permits and Agreements Clause: Permission granted: (a) For such use of the premises as is usual and incidental to the business conducted therein for existing and increased hazards and for change in use or occupancy except as to any specific hazard, use, or occupancy prohibited by the express terms of this policy or by any endorsement thereto; (b) To keep and use all articles and materials, usual and incidental to said business, in such quantities as the exigencies of the business require; (c) For the building(s) to be in course of construction, alteration or repair, all without limit of time but without extending the term of this policy, and to build additions thereto, and this policy, under its respective item(s), shall cover on or in such additions in contact with such building(s); but if any building herein described is protected by automatic sprinklers, this permit shall not be held to include the reconstruction or the enlargement of any building so protected, without the consent of this Company in writing. This permit does not waive or modify any of the terms or conditions of the Automatic Sprinkler Clause (if any) attached to this policy.



This insurance shall not be prejudiced: (1) By any act or neglect of the owner of the building(s) if the Insured is not the owner thereof, or by any act or neglect of any occupant of the building(s) (other than the named Insured), when such act or neglect of the owner or occupant is not within the control of the named Insured; (2) By failure of the named Insured to comply with any warranty or condition contained in any form, rider or endorsement attached to this policy with regard to any portion of the premises over which the named Insured has no control; nor (3) shall any insurance hereunder on building(s) be prejudiced by any error in stating the name, number, street or location of such building(s).

24. Electrical Apparatus Clause: If Electrical Appliances or Devices (Including Wiring) Are Covered Under This Policy, This Company Shall Not Be Liable for Any Electrical Injury or Disturbance to the Said Electrical Appliances or Devices (Including Wiring) Caused by Electrical Currents Artificially Generated Unless Fire Ensues, and if Fire Does Ensur This Company Shall Be Liable Only for Its Proportion of Loss Caused by Such Ensuing Fire.

#### Concealment, Fraud

This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or

in case of any fraud or false swearing by the insured relating thereto.

### Uninsurable and Excepted Property

This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

### Perils Not Included

This company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this company be liable for loss by theft.

### Other Insurance

Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

### Conditions Suspending or Restricting Insurance

Unless otherwise provided in writing added hereto this company shall not be liable for loss occurring (a) While the hazard is increased by any means within the control or knowledge of the insured; or (b) While a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or (c) As a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

### Other Perils or Subjects

Any other perils to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

### Added Provisions

The extent of the application of insurance under this policy and of the contribution to be made by this company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy or by statute is subject to change.

### Waiver Provisions

No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this company relating to appraisal or to any examination provided for herein.

### Cancellation of Policy

This policy shall be cancelled at any time at the request of the insured, in which case this company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

### Mortgage Interests and Obligations

If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a 10 days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the

mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

### Pro Rata Liability

This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

### Requirements in Case Loss Occurs

The insured shall give written notice to this company of any loss without unnecessary delay, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within 60 days after the loss, unless such time is extended in writing by this company, the insured shall render to this company a proof of loss signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: The time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, pos-

session or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required and obtainable, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

#### Appraisal

In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of

a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

### Company's Options

It shall be optional with this company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

### Abandonment

There can be no abandonment to this company of any property.

### When Loss Payable

The amount of loss for which this company may be liable shall be payable 60 days after proof of loss, as herein provided, is received by this company and ascertainment of the loss is made either by agreement between the insured and this company expressed in writing or by the filing with this company of an award as herein provided.

### Suit

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

### Subrogation

This company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this company.

### Extended Coverage Endorsement

(Perils of Windstorm, Hail, Explosion, Riot, Riot Attending a Strike, Civil Commotion, Aircraft, Vehicles, Smoke, Except as Hereinafter Provided)

Attached to and forming part of Policy No. 70997 of the National American Insurance Company.

Issued to Morgan A. Stivers, et al.

Agency at Pasadena, California; Dated December 1, 1952.

Rate for Extended Coverage: Various.

Effective Date of this Endorsement: December 1, 1952.

In consideration of \$. . . (Included) premium, and subject to provisions and stipulations (hereinafter referred to as "provisions") herein and in the policy to which this endorsement is attached,



including riders and endorsements thereon, the coverage of this policy is extended to include direct loss by Windstorm, Hail, explosion, Riot, Riot Attending a Strike, Civil Commotion, Aircraft, Vehicles and Smoke.

This Endorsement Does Not Increase the Amount or Amounts of Insurance Provided in the Policy to Which It Is Attached.

If this policy covers on two or more items, the provisions of this endorsement shall apply to each item separately.

Substitution of Terms: In the application of the provisions of this policy, including riders and endorsements, but not this endorsement, to the perils covered by this Extended Coverage Endorsement, wherever the word "fire" appears there shall be substituted therefor the peril involved or the loss caused thereby, as the case requires.

Apportionment Clause: This Company Shall Not Be Liable for a Greater Proportion of Any Loss From Any Peril or Perils Included in This Endorsement Than (1) the Amount of Insurance Under This Policy Bears to the Whole Amount of Fire Insurance Covering the Property, Whether Collectible or Not, and Whether or Not Such Other Fire Insurance Covers Against the Additional Peril or Perils Insured Hereunder; (2) Nor for a Greater Proportion Than the Amount of Insurance Under This Policy Bears to the Amount of All Insurance, Whether Collectible or Not, Covering in Any Manner Such Loss; Furthermore, if There Be Insurance Other Than Fire Insurance Covering

Any One or More of the Perils Causing Loss Hereunder, Covering, Specifically Any Individual Unit of Property Involved in the Loss Only Such Proportion of the Insurance Under This Policy Shall Apply to Such Unit Specifically Covered, as the Value of Such Unit Shall Bear to the Total Value of All the Property Covered Under This Policy, Whether Such Other Insurance Contains a Similar Clause or Not.

War Risk Exclusion Clause: This Company Shall Not Be Liable for Loss Caused Directly or Indirectly by (a) Hostile or Warlike Action in Time of Peace or War, Including Action in Hindering, Combating or Defending Against an Actual, Impending or Expected Attack, (1) By Any Government or Sovereign Power, De Jure or De Facto, or by Any Authority Maintaining or Using Military, Naval or Air Forces; or (2) By Military, Naval or Air Forces, or (3) By an Agent of Any Such Government, Power, Authority or Forces, It Being Understood That Any Discharge, Explosion or Use of Any Weapon of War Employing Atomic Fission or Radioactive Force Shall Be Conclusively Presumed to Be Such a Hostile or Warlike Action by Such a Government Power, Authority or Forces; (b) the Insurrection, Rebellion, Revolution, Civil War, Usurped Power, or Action Taken by Governmental Authority in Hindering, Combating or Defending Against Such an Occurrence.

Waiver of Policy Provisions: A claim for loss from perils included in this endorsement shall not

be barred because of change of occupancy, nor because of vacancy or unoccupancy.

Provisions Applicable Only to Windstorm and Hail: This Company Shall Not Be Liable for Loss Caused Directly or Indirectly by (a) Frost or Cold Weather or (b) Snowstorm, Tidal Wave, High Water, Overflow or Ice (Other Than Hail), Whether Driven by Wind or Not.

This Company Shall Not Be Liable for Loss to the Interior of the Building or the Property Covered Therein Caused (a) By Rain, Snow, Sand or Dust, Whether Driven by Wind or Not, Unless the Building Covered or Containing the Property Covered Shall First Sustain an Actual Damage to Roof or Walls by the Direct Force of Wind or Hail and They Shall Be Liable for Loss to the Interior of the Building Through Openings in the Roof or Walls Made by Direct Action of Wind or Hail, or (b) By Water From Sprinkler Equipment or Other Piping, Unless Such Equipment or Piping Be Damaged as a Direct Result of Wind or Hail.

This Company Shall Not Be Liable for Loss to the Following Property: (1) Hay, Straw and Fodder, All Only While Unbaled and Located Outside of Building; or (2) Growing Crops Wherever Located.

The Provisions Printed on the Back of This Form Are Hereby Referred to and Made a Part Hereof.

/s/ TRUMAN B. STIVERS,  
Agent.

Caution: When This Endorsement Is Attached to One Fire Policy, the Insured Should Secure Like Coverage on All Fire Policies Covering the Same Property.

Provisions Referred to in and Made Part of This Form (No. 202)

Provisions Applicable Only to Explosion: Loss by Explosion Shall Include Direct Loss Resulting From the Explosion of Accumulated Cases or Unconsumed Fuel Within the Firebox (or the Combustion Chamber of Any Fired Vessel or Within the Flues or Passages Which Conduct the Cases of Combustion Therefrom, but This Company Shall Not Be Liable for Loss by Explosion, Rupture or Bursting of Steam Boilers, Steam Pipes, Steam Turbines, Steam Engines or Fly-wheels, Owned, Operated or Controlled by the Insured or Located in the Building(s) Described in This Policy.

Any Other Explosion Clause Made a Part of This Policy Is Superseded by This Endorsement.

Provisions Applicable Only to Riot, Riot Attending a Strike and Civil Commotion: Loss by riot, riot attending a strike or civil commotion shall include direct loss by acts of striking employees of the owner or tenant(s) of the described building(s) while occupied by said striking employees and shall also include direct loss from pillage and looting occurring during and at the immediate place of a riot, riot attending a strike or civil commotion. This Company Shall Not Be Liable, However, for Loss

Resulting From Damage to or Destruction of the Described Property Owing to Change in Temperature or Interruption of Operations Resulting From Riot or Strike or Occupancy by Striking Employees or Civil Commotion, Whether or Not Such Loss, Due to Change in Temperature or Interruption of Operations, Is Covered by This Policy as to Other Perils.

Provisions Applicable Only to Loss by Aircraft and Vehicles: Loss by aircraft includes direct loss by objects falling therefrom. The Term "Vehicles," as Used in This Endorsement, Means Vehicles Running on Land or Tracks but Not Aircraft. This Company Shall Not Be Liable, However, for Loss (a) by Any Vehicle Owned or Operated by the Insured or by Any Tenant of the Described Premises; (b) by Any Vehicle to Fences, Driveways, Walks or Lawns; (c) to Any Aircraft or Vehicle Including Contents Thereof Other Than Stocks of Aircraft or Vehicles in Process of Manufacture or for Sale.

Provisions Applicable Only to Smoke: The Term "Smoke," as Used in This Endorsement, Means Only Smoke Due to a Sudden, Unusual and Faulty Operation of Any Heating or Cooking Unit, Only When Such Unit Is Connected to a Chimney by a Pipe or Vent, and While in or on the Premises Described in This Policy, Excluding, However, Smoke From Fireplaces or Industrial Apparatus.

Provisions Applicable Only When This Endorse-

ment Is Attached to a Policy Covering Business Interruption (Use and Occupancy), Extra Expense, Additional Living Expense, Rents, Leasehold Interest, Profits and Commissions, or Consequential Loss; When This Endorsement Is Attached to a Policy Covering Business Interruption (Use and Occupancy), Extra Expense, Additional Living Expense, Rents, Leasehold Interest, Profits and Commissions, or Consequential Loss, the Term "Direct," as Applied to Loss, Means Loss, as Limited and Conditioned in Such Policy, Resulting From Direct Loss to Described Property From Perils Insured Against; and, While the Business of the Owner or Tenant(s) of the Described Building(s) Is Interrupted by a strike at the Described Location, This Company Shall Not Be Liable for Any Loss Owing to Interference by Any Person(s) With Rebuilding, Repairing or Replacing the Property Damage or Destroyed or With the Resumption or Continuation of Business.

[Endorsed]: Filed September 9, 1955.

In the District Court of the United States  
for the Southern District of California

No. 18737-Y

MORGAN A. STIVERS,

Plaintiff,

vs.

NATIONAL AMERICAN INSURANCE COM-  
PANY, a Corporation, et al.,

Defendants.

ANSWER OF DEFENDANTS GIRARD IN-  
SURANCE COMPANY OF PHILADEL-  
PHIA, PENNSYLVANIA

Defendant Girard Insurance Company of Phila-  
delphia, Pennsylvania, answers the complaint of  
plaintiff as follows:

#### First Defense

Answers the Third Alleged Cause of Action  
Therein Contained as Follows:

1. Said defendant answers Paragraph I thereof,  
as follows:

Said defendant alleges that it is without knowl-  
edge or information sufficient to form a belief as to  
the truth of the allegations contained in Paragraph  
I, III and IV of said first alleged cause of action  
in said complaint.

Said defendant admits that on said day a fire  
occurred at the said premises and damaged certain  
buildings and contents.

Said defendant admits that said packing house and platform was of a cash value in the amount of \$18,000.00, said equipment was of a cash value in the amount of \$12,500.00, said field boxes and supplies were of a cash value in the amount of \$5,000.00 and said storage building was of the cash value in the amount of \$2,500.00. [34]

Said defendant denies each and every allegation contained in Paragraph I of said Third Cause of Action not so expressly admitted or denied.

2. Said defendant answers Paragraph III thereof, as follows:

On said day it executed a California Standard Form fire insurance policy No. 2702 and attached thereto extended coverage endorsement, loss payable endorsement and building, equipment and 2 stock form No. 78, wherein the named insured was Morgan A. Stivers and Raymond K. Stivers, dba Stivers Packing Company, in said respective amounts.

Said defendant denies each and every allegation therein contained not so expressly admitted.

3. Said defendant answers Paragraph IV thereof, as follows:

It admits said policy replaced former policy No. 102, and said defendant denies each and every allegation therein contained not so expressly admitted.

4. Said defendant answers Paragraph V thereof, as follows:

Said defendant admits that said Lender's Loss Payable endorsement was attached to said policy.



Said defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said Paragraph V.

5. Said defendant answers Paragraph VI thereof, as follows:

Said defendant admits that prior to the expiration of said 60 day period it extended the time to file said Proof of Loss, and that said plaintiff filed said Proof of Loss within said extended period, and said defendant denies each and every allegation therein contained not so expressly admitted.

6. Said defendant answers Paragraph VII thereof, as follows:

It alleges that:

(a) Lines 28 to 34 of said policy provides, in part, as follows:

“Conditions suspending or restricting insurance, unless otherwise provided in writing, added hereto this company shall not be liable for loss occurring \* \* \*; [35] or (b) While a described building, whether intended for occupancy by owner or tenant, is vacant or occupied beyond a period of 60 days; \* \* \*”

(b) Paragraph 21 of said Building, Equipment and Stock form provides, in part, as follows:

“Vacancy—Unoccupancy Clause: Permission is granted to remain vacant or unoccupied without limit of time, Except As Follows: \* \* \*; (2) If the subject of insurance (whether building or contents or both) is a cannery, fruit, nut or vegetable packing or processing plant \* \* \*,

permission is granted (a) to remain vacant not to exceed sixty (60) consecutive days, and (b) to remain unoccupied but not Vacant for not to exceed ten (10) consecutive months.”

Said defendant is informed and believes and upon such information and belief alleges that said premises was unoccupied from July, 1952, to and including October 13, 1954.

(c) Lines 149 to 152 of said policy provide, in part, as follows:

“Suit: No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all of the requirements of this policy shall have been complied with” \* \* \*

Said defendant denies each and every allegation therein contained not so expressly admitted.

7. Said defendant answers Paragraph VIII thereof, as follows:

Said defendant admits that Lines 25 to 27 of said policy referred to “Other Insurance” and that there was insurance on said packing house and platform in the said sum of \$18,000.00, on said equipment in said sum of \$12,500.00, on said field supplies and boxes in said sum of \$5,000.00 on said storage building in the sum of \$2,500.00 and on said bunk house in the sum of \$2,000.00.

Said defendant denies each and every allegation therein contained not so expressly admitted.

8. Said defendant answers Paragraph IX thereof, as follows:

Said defendant admits that it has not paid any part of said loss and said defendant denies each and every allegation therein contained not so expressly admitted. [36]

Answers the Fourth Alleged Cause of Action Therein Contained as Follows:

1. Said defendant answers Paragraph I thereof, as follows:

Said defendant re-alleges, re-affirms and re-adopts as a part hereof all of the allegations contained in Paragraph I of the foregoing answer to the Third Alleged Cause of Action, the same as if specifically set forth herein.

2. Said defendant answers Paragraph II thereof, as follows:

Said defendant re-alleges, re-affirms and re-adopts as a part thereof all of the allegations contained in Paragraphs II to VIII of the foregoing answer to the Third Alleged Cause of Action the same as if set forth herein.

3. Said defendant denies each and every allegation contained in Paragraph III thereof, and alleges that lines 46 to 51 of said policy read as follows:

“Waiver Provisions. No Permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provisions, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on

the part of this company relating to appraisal or to any examination provided for herein.”

### Second Defense

Said complaint and said third and fourth alleged causes of action therein contained fail to state a claim against this defendant upon which relief can be granted.

### Third Defense

Said defendant alleges that it is informed and believes and upon such information and belief alleges that Raymond K. Stivers, Howard Stivers and said Farmers and Merchants Bank of Long Beach, each, is a real party in interest herein.

Wherefore, said defendant prays that said plaintiff take [37] nothing and said defendant recover its costs of suit herein and for such other and further relief as is just and proper in the premises.

/s/ AUGUSTUS CASTRO,  
Attorney for Defendant Girard Insurance Company  
of Philadelphia, Pennsylvania.

[Endorsed]: Filed September 15, 1955. [38]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT QUEEN INSURANCE COMPANY OF AMERICA

Defendant Queen Insurance Company of America answers the complaint of plaintiff as follows:

First Defense

Answers the Seventh Alleged Cause of Action Therein Contained as Follows:

1. Said defendant answers Paragraph I thereof, as follows:

Said defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph I and IV of the first alleged cause of action.

Said defendant admits that on said day a fire occurred at said premises and damaged certain buildings and contents.

Said defendant admits that packing house and platform was of a cash value in the amount of \$18,000.00, said equipment was of a cash value in the amount of \$12,500.00, said field boxes and supplies were of a cash value in the amount of \$5,000.00 and said storage building was of the cash value in the amount of \$2,500.00. [39]

Said defendant denies each and every allegation contained in Paragraph I of said Seventh Cause of Action not so expressly admitted or denied.

2. Said defendant answers Paragraph III thereof, as follows:

Said defendant admits that prior to said fire Roy A. McMillan was licensed by the State of California as an insurance agent and authorized, by and on behalf of said defendant company to transact insurance; and defendant admits that after said fire it authorized said "General Adjustment Bureau, Inc., a corporation" to determine the actual cash value of the real and personal property involved in said fire and the amount of loss thereto.

Said defendant denies each and every allegation therein contained not so expressly admitted.

3. Said defendant answers Paragraph IV thereof, as follows:

On said day it executed a California Standard Form fire insurance policy No. 764197 and attached thereto extended coverage endorsement, loss payable endorsement, and building, equipment and stock form No. 78 and insured said buildings, equipment and supplies and boxes in said respective amounts.

Said defendant denies each and every allegation therein contained not so expressly admitted.

4. Said defendant answers Paragraph V thereof, as follows:

Said defendant admits that said Lender's Loss Payable endorsement was attached to said policy. Said defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said Paragraph V.

5. Said defendant answers Paragraph VI thereof, as follows:

Said defendant admits that prior to the expiration of said 60 day period it extended the time to file said Proof of Loss, and that said plaintiff filed said Proof of Loss within said extended period, and said defendant denies each and every allegation therein contained not so expressly admitted. [40]

6. Said defendant answers Paragraph VII thereof, as follows:

It alleges that:

(a) Lines 28 to 34 of said policy provides, in part, as follows:

“Conditions suspending or restricting insurance. Unless otherwise provided in writing added thereto this company shall not be liable for loss occurring \* \* \*; or (b) While a described building, whether intended for occupancy by owner or tenant, is vacant or occupied beyond a period of 60 days; \* \* \*”

(b) Paragraph 21 of said Building, Equipment and Stock form provides, in part, as follows:

“Vacancy—Unoccupancy Clause: Permission is granted to remain vacant or unoccupied without limit of time, Except As Follows: \* \* \*; (2) If the subject of insurance (whether building or contents or both) is a cannery, fruit, nut or vegetable packing or processing plant \* \* \*, permission is granted (a) to remain vacant not to exceed sixty (60) consecutive days, and (b) to remain unoccupied but not Vacant for not to exceed ten (10) consecutive months.”

Said defendant is informed and believes and upon such information and belief alleges that said premises was unoccupied from July, 1952, to and including October 13, 1954.

(c) Lines 149 to 152 of said policy provide, in part, as follows:

“Suit: No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all of the requirements of this policy shall have been complied with” \* \* \*

Said defendant denies each and every allegation therein contained not so expressly admitted.

7. Said defendant answers Paragraph VIII thereof, as follows:

Said defendant admits that Lines 25 to 27 of said policy referred to “Other Insurance” and that there was insurance on said packing house and platform in the said sum of \$18,000.00, on said equipment in said sum of \$12,500.00, on said field supplies and boxes in said sum of \$5,000.00 on said storage building in the sum of \$2,500.00 and on said bunk house in the sum of \$2,000.00. [41]

Said defendant denies each and every allegation therein contained not so expressly admitted.

8. Said defendant answers Paragraph IX thereof, as follows:

Said defendant admits that it has not paid any part of said loss and said defendant denies each and every allegation therein contained not so expressly admitted.



Answers the Eighth Alleged Cause of Action Therein Contained as Follows:

1. Said defendant answers Paragraph I thereof, as follows:

Said defendant re-alleges, re-affirms and re-adopts as a part hereof all of the allegations contained in Paragraph I of the foregoing answer to the Seventh Alleged Cause of Action the same as if specifically set forth herein.

2. Said defendant answers Paragraph II thereof, as follows:

Said defendant re-alleges, re-adopts and re-affirms as a part hereof all of the allegations contained in Paragraphs 2 to 8 of the foregoing answer to the Seventh Alleged Cause of Action the same as if specifically set forth herein.

3. Said defendant denies each and every allegation contained in Paragraph III thereof.

#### Second Defense

Said complaint and said seventh and eighth causes of action therein contained fail to state a claim against this defendant upon which relief can be granted.

#### Third Defense

Said defendant alleges that it is informed and believes and upon such information and belief alleges that Raymond K. Stivers, Howard Stivers and said Farmers and Merchants Bank of Long Beach, each, is a real party in interest herein. [42]

Wherefore, said defendant prays that said plaintiff take nothing and said defendant recover its costs of suit herein and for such other and further relief as is just and proper in the premises.

/s/ AUGUSTUS CASTRO,  
Attorney for Defendant Queen Insurance Company  
of America.

[Endorsed]: Filed September 15, 1955. [43]

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[Title of District Court and Cause.]

ANSWER OF DEFENDANT INSURANCE  
COMPANY OF THE STATE OF PENN-  
SYLVANIA

Defendant Insurance Company of the State of Pennsylvania, answers the complaint of plaintiff as follows:

First Defense

Answers the Fifth Alleged Cause of Action Therein Contained as Follows:

1. Said defendant answers Paragraph I thereof, as follows:

Said defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph I and IV of the first alleged cause of action.

Said defendant admits that on said day a fire occurred at the said premises and damaged certain buildings and contents.

Said defendant admits that said packing house and platform was of the cash value in the amount of \$18,000.00, said equipment was of a cash value in the amount of \$12,500.00, said field boxes and supplies were of a cash value in the amount of \$5,000.00 and said storage building was of the cash value in the amount of \$2,500.00. [44]

Said defendant denies each and every allegation contained in Paragraph I of said Fifth Cause of Action not so expressly admitted or denied.

2. Said defendant answers Paragraph III thereof, as follows:

Said defendant admits that prior to said fire Roy A. McMillin was licensed by the State of California as an insurance agent and authorized, by and on behalf of said defendant company to transact insurance; and after said fire, said defendant admits that it authorized said "General Adjustment Bureau, Inc., a corporation" to determine the actual cash value of the real and personal property involved in said fire and the amount of loss thereto.

Said defendant denies each and every allegation therein contained not so expressly admitted.

3. Said defendant answers Paragraph IV thereof, as follows:

On said day it executed a California Standard Form fire insurance policy No. 101260 and attached thereto extended coverage endorsement, loss payable endorsement and building, equipment and stock form No. 78 and insured said buildings, equipment and supplies and boxes in said respective amounts.

Said defendant denies each and every allegation therein contained not so expressly admitted.

4. Said defendant answers Paragraph V thereof, as follows:

Said defendant admits that said Lender's Loss Payable endorsement was attached to said policy. Said defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said Paragraph V.

5. Said defendant answers Paragraph VI thereof, as follows:

Said defendant admits that prior to the expiration of said 60 day period it extended the time to file said Proof of Loss, and that said plaintiff filed said Proof of Loss within said extended period, and said defendant denies each and every allegation therein contained not so expressly admitted.

6. Said defendant answers Paragraph VII thereof, as follows: [45]

It alleges that:

(a) Lines 28 to 34 of said policy provides, in part, as follows:

“Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this company shall not be liable for loss occurring \* \* \*, or (b) While a described building, whether intended for occupancy by owner or tenant, is vacant or occupied beyond a period of 60 days; \* \* \*”

(b) Paragraph 21 of said Building, Equipment and Stock form provides, in part, as follows:

“Vacancy—Unoccupancy Clause: Permission is granted to remain vacant or unoccupied without limit of time, Except As Follows: \* \* \*; (2) If the subject of insurance (whether building or contents or both) is a cannery, fruit, nut or vegetable packing or processing plant \* \* \*, permission is granted (a) to remain vacant not to exceed sixty (60) consecutive days, and (b) to remain unoccupied but not Vacant for not to exceed ten (10) consecutive months.”

Said defendant is informed and believes and upon such information and belief alleges that said premises was unoccupied from July, 1952, to and including October 13, 1954.

(c) Lines 149 to 152 of said policy provide, in part, as follows:

“Suit: No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all of the requirements of this policy shall have been complied with” \* \* \*

Said defendant denies each and every allegation therein contained not so expressly admitted.

7. Said defendant answers Paragraph VIII thereof, as follows:

Said defendant admits that Lines 25 to 27 of said policy referred to “Other Insurance” and that there was insurance on said packing house and platform in the said sum of \$18,000.00, on said equip-

ment in said sum of \$12,500.00, on said field supplies and boxes in said sum of \$5,000.00 on said storage building in the sum of \$2,500.00 and on said bunk house in the sum of \$2,000.00.

Said defendant denies each and every allegation therein contained not so expressly admitted. [46]

8. Said defendant answers Paragraph IX thereof, as follows:

Said defendant admits that it has not paid said loss or any part thereof and denies each and every allegation therein contained not so expressly admitted.

Answers the Sixth Alleged Cause of Action Therein Contained as Follows:

1. Said defendant answers Paragraph I thereof, as follows:

Said defendant re-alleges, re-adopts and re-affirms as a part hereof all of the allegations contained in Paragraph I of the foregoing answer to the Fifth Alleged Cause of Action the same as if specifically set forth herein.

2. Said defendant answers Paragraph II thereof, as follows:

Said defendant re-alleges, re-adopts and re-affirms as a part hereof all of the allegations contained in Paragraphs 2 to 8 of the foregoing answer to the Fifth Alleged Cause of Action the same as if specifically set forth herein.

3. Said defendant denies each and every allegation contained in Paragraph III thereof.

Second Defense

Said complaint and said fifth and sixth alleged causes of action therein contained fail to state a claim against this defendant upon which relief can be granted.

Third Defense

Said defendant alleges that it is informed and believes and upon such information and belief alleges that Raymond K. Stivers, Howard Stivers and said Farmers and Merchants Bank of Long Beach, each, is a real party in interest herein.

Wherefore, said defendant prays that said plaintiff take [47] nothing and said defendant recover its costs of suit herein and for such other and further relief as is just and proper in the premises.

/s/ AUGUSTUS CASTRO,

Attorney for Defendant Insurance Company of the State of Pennsylvania.

[Endorsed]: Filed September 15, 1955. [48]

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[Title of District Court and Cause.]

ANSWER OF DEFENDANT NATIONAL  
AMERICAN INSURANCE COMPANY

Defendant National American Insurance Company answers the complaint of plaintiff as follows:

First Defense

Answers the First Alleged Cause of Action Therein Contained as Follows:

1. Said defendant answers Paragraphs I and IV thereof, as follows:

Said defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs I and IV thereof.

2. Said defendant answers Paragraph III thereof, as follows:

Said defendant admits that prior to said fire Truman B. Stivers was licensed by the State of California as an insurance agent and authorized, by and on behalf of said defendant company to transact insurance; and after said fire, said defendant admits that it authorized said General Adjustment Bureau, Inc., a corporation, to determine the actual cash value of the real and personal property involved in said fire and the amount of loss thereto. [49]

Said defendant denies each and every allegation therein contained not so expressly admitted.

3. Said defendant answers Paragraph V thereof, as follows:

Said defendant admits that on said day it executed a California Standard Form Fire Insurance policy Number 70997, and attached thereto extended coverage endorsement SFBF202, Building, Equipment and Stock form Number 78 wherein the named insured was Morgan A. Stivers, dba Stivers Packing Co. in said respective amounts.

Said defendant denies each and every allegation therein contained not so expressly admitted.



4. Said defendant answers Paragraph VI thereof, as follows:

Said defendant admits that on said day a fire occurred at said premises and damaged certain buildings and contents and said defendant denies each and every allegation therein contained not so expressly admitted.

5. Said defendant answers Paragraph VII thereof, as follows:

Said defendant admits that said packing house and platform had an actual cash value of \$18,000.00, said equipment had an actual cash value of \$12,500.00, said field boxes and supplies had an actual cash value of the amount of \$5,000.00, said storage buildings had an actual cash value in the aggregate of \$2,500.00 and said defendant denies each and every allegation therein contained not so expressly admitted, and in this connection denies that there was a loss in the sum of \$166,642.00, or any part thereof, or any sum at all, and denies that there was a loss in connection with said packing house and platform in the amount of \$65,000.00, or any part thereof, or any sum at all, and denies there was a loss in connection with said equipment in the amount of \$67,242.00, or any part thereof, or any sum at all, and denies that there was a loss in connection with stock including field supplies and boxes in the amount of \$25,150.00, or any part thereof, or any sum at all, and denies that there was a loss in connection with storage buildings in the amount of \$9,250.00, or any [50] part thereof, or at all.

6. Said defendant answers Paragraph VIII thereof, as follows:

Said defendant admits that prior to the expiration of said 60 day period it extended the time to file said Proof of Loss and that said plaintiff filed said Proof of Loss within said extended period and said defendant denies each and every allegation therein contained not so expressly admitted.

7. Said defendant answers Paragraph IX thereof, as follows:

Said defendant alleges that:

(a) Lines 28 to 34 of said policy provides, in part, as follows:

“Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this company shall not be liable for loss occurring \* \* \* or (b) While a described building, whether intended for occupancy by owner or tenant, is vacant or occupied beyond a period of 60 days \* \* \*”;

(b) Paragraph 21 of said Building, Equipment and Stock form provides, in part, as follows:

“Vacancy—Unoccupancy Clause: Permission is granted to remain vacant or unoccupied without limit of time, Except as Follows: \* \* \* (2) If the subject of insurance (whether building or contents or both) is a cannery, fruit, nut or vegetable packing or processing plant \* \* \* permission is granted (a) to remain vacant not to exceed sixty (60) consecutive days, and (b) to remain unoccupied but not Vacant for not to exceed ten (10) consecutive months.”

Said defendant is informed and believes and upon such information and belief alleges that said premises was unoccupied from July, 1952, to and including October 13, 1954.

(c) Lines 149 to 152 of said policy provide, in part, as follows:

“Suit: No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all of the requirements of this policy shall have been complied with” \* \* \*

Said defendant denies each and every allegation therein contained not so expressly admitted. [51]

8. Said defendant answers Paragraph X thereof, as follows:

Said defendant admits that Lines 25 to 27 of said policy referred to “Other Insurance” and that there was insurance on said packing house and platform in the said sum of \$18,000.00, on said equipment in said sum of \$12,500.00, on said field supplies and boxes in said sum of \$5,000.00 on said storage building in the sum of \$2,500.00 and on said bunk house in the sum of \$2,000.00.

Said defendant denies each and every allegation therein contained not so expressly admitted and in this connection denies that said defendant has any liability to said plaintiff in the amount of \$8,000.00, or any part thereof, or in any amount, or at all.

9. Said defendant answers Paragraph XI thereof, as follows:

Said defendant admits that it has not paid any part of any loss and said defendant denies each and every allegation therein contained not so expressly admitted.

Answers the Second Alleged Cause of Action Therein Contained as Follows:

1. Said defendant answers Paragraph I thereof, follows:

Said defendant re-alleges, re-affirms and re-adopts as a part hereof all of the allegations contained in Paragraphs 1 to 9, inclusive, of the foregoing answer to the first alleged cause of action, the same as if specifically set forth herein.

2. Said defendant denies each and every allegation contained in Paragraph II thereof, and alleges that lines 46 to 51 of said policy read as follows:

“Waiver Provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provisions, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this company relating to appraisal or to any examination provided for [52] herein.”

#### Second Defense

Said complaint and said first and second alleged causes of action therein contained fail to state a claim against this defendant upon which relief can be granted.

Third Defense

Said defendant alleges that it is informed and believes and upon such information and belief alleges that Raymond K. Stivers, Howard Stivers and said Farmers and Merchants Bank of Long Beach, each, is a real party in interest herein.

Wherefore, said defendant prays that said plaintiff take nothing and said defendant recover its costs of suit herein and for such other and further relief as is just and proper in the premises.

/s/ AUGUSTUS CASTRO,

Attorney for Defendant National American Insurance Company.

Affidavit of service by mail attached.

[Endorsed]: Filed October 7, 1955. [53]

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[Title of District Court and Cause.]

STIPULATION TO AMENDMENT OF PLAINTIFF'S COMPLAINT AND DEFENDANTS' ANSWER THERETO

It Is Hereby Stipulated by and between counsel for the Plaintiff and Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, that the Third and Fourth causes of action of Plaintiff's complaint may be amended by adding thereto the following allegation:

“That at all times herein mentioned, Truman B. Stivers and the General Adjustment Bureau, Inc.,

a Corporation, were the duly authorized agents, servants and employees of the Defendant, Girard Insurance Company of Philadelphia, Pennsylvania.”

It Is Further Stipulated by and between the aforesaid counsel that the aforesaid allegation may be deemed denied by [55] said Defendant, Girard Insurance Company of Philadelphia, Pennsylvania.

Dated this 3rd day of January, 1956.

/s/ HARWOOD STUMP,  
Attorney for Plaintiff.

/s/ AUGUSTUS CASTRO,  
Attorney for Defendants.

It is so ordered.

Date: Jan. 18, 1956.

/s/ LEON R. YANKWICH,  
Judge.

[Endorsed]: Filed January 19, 1956. [56]

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[Title of District Court and Cause.]

PLAINTIFF'S TRIAL MEMORANDA IN  
COMPLIANCE WITH RULE 12

\* \* \*

Admissions and Stipulations

The following facts are admitted by the pleadings:

A. Policies and Coverage—Each Defendant ad-

mits that it issued to the Plaintiff a policy of insurance in the amounts and at the time alleged in the complaint.

B. Fire—Each Defendant admits that fire occurred at said premises on October 13, 1954, and that certain buildings and contents were damaged thereby.

C. Value at time of Loss—Each Defendant admits the cash value of the insured property at time of loss is as follows:

|                                 |             |
|---------------------------------|-------------|
| Packing house and platform..... | \$18,000.00 |
| Equipment .....                 | 12,500.00   |
| Field boxes and supplies.....   | 5,000.00    |
| Storage building .....          | 2,500.00    |

D. Proof of Loss—Each Defendant admits extending the time for Plaintiff to file Proof of Loss and that Plaintiff filed said Proof of Loss within said extended period.

E. Agency—Each Defendant, except Girard Insurance Company of Philadelphia, admits that it authorized the General Adjustment Bureau, Inc., a Corporation, to determine the actual cash value of the real and personal property involved in said fire and the amount of loss thereto.

Defendant National American Insurance Company admits that prior to said fire Truman B. Stivers was authorized by it to transact insurance for and on its behalf.

Defendants Queen Insurance Company of America and Insurance Company of the State of Penn-

sylvania admit that prior [59] to said fire they authorized Roy A. McMillan to transact insurance for and on their behalf.

F. Other Insurance—Each Defendant admits other insurance was permitted under the terms of its policy and admits that there was insurance on premises and the contents thereof, as alleged in the complaint.

G. Payment—Each Defendant admits that it has paid nothing to the Plaintiff for and on account of any loss occurring by reason of said fire. [60]

\* \* \*

Respectfully submitted,

/s/ HARWOOD STUMP,  
Attorney for Plaintiff.

Affidavit of service by mail attached .

[Endorsed]: Filed February 13, 1956. [63]

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[Title of District Court and Cause.]

DEFENDANTS' REPLY TRIAL MEMORANDA

\* \* \*

III.

In addition, to the admissions set forth at page 3, Paragraphs A, B, C, D, F and G of plaintiffs' brief,  
Admissions and Stipulations



defendants admit the loss and damage was as follows:

|                               |             |
|-------------------------------|-------------|
| Packing house .....           | \$18,000.00 |
| Equipment .....               | 12,500.00   |
| Field boxes and supplies..... | 5,000.00    |
| Storage building .....        | 2,500.00    |

In reply to Paragraph E page 3 plaintiff's brief entitled "Agency," Truman B. Stivers, was a local agent authorized to solicit insurance for defendant Girard at Pasadena, California, and Roy A. McMillan was a local agent authorized to solicit insurance for defendants Queen and State of Altadena, California. [71]

\* \* \*

/s/ AUGUSTUS CASTRO,  
Attorney for Defendants.

Affidavit of service by mail attached.

[Endorsed]: Filed February 17, 1956. [79]

[Title of District Court and Cause.]

MEMORANDUM OPINION

This action brought by Morgan A. Stivers is to recover against four insurance companies, National American Insurance Company, Girard Insurance Company of Philadelphia, The Insurance Company of the State of Pennsylvania, and Queen Insurance Company of America [hereinafter each to be respectively known as National, Girard, State, and

Queen] on four different policies of insurance covering property owned by the plaintiff.

The property involved was located at Sides Station, 3 miles north of Lindsay, Tulare County, California, and consisted primarily of a citrus fruit packing house and loading platform, field supplies and boxes, a bunk house and a storage building. The policies were effective December 1, 1952, and a fire destroyed the property on October 13, 1954. [81]

Two of the policies were obtained through Truman B. Stivers, a nephew of the plaintiff, who was licensed as an insurance agent in Pasadena, California, and who represented the defendants National and Girard. Truman Stivers was not an agent of either Queen or State, and the policies of insurance issued from those companies were obtained from their duly authorized agent, Roy A. MacMillan. All policies were written on the standard California form.

The issue presented for determination is whether the insurance policies were suspended at the time of the fire because of non-compliance with one of the terms of each particular policy, i.e. because of non-occupancy of the premises as a fruit-packing plant for a period of more than ten consecutive months prior to the fire.

The pertinent provisions of each policy of fire insurance provide as follows:

Lines 28-34 of each policy:

Conditions Suspending or Restricting Insurance:

Unless otherwise provided in writing added hereto this company shall not be liable for a loss occurring \* \* \* (b) While a described building, whether intended for occupancy for owner or tenant, is vacant beyond a period of sixty consecutive days \* \* \*

Paragraph 21 of Building, Equipment and Stock Endorsement No. 78 extends the period of unoccupancy as follows:

Vacancy—Unoccupancy Clause:

Permission is granted to remain vacant or unoccupied without limit of time, Except As Follows \* \* \*

(2) If the subject of insurance (whether building or contents or both) is a cannery, fruit, nut or vegetable packing or processing plant \* \* \* permission is granted (a) to remain vacant for not to exceed sixty (60) consecutive days, and (b) to remain unoccupied But Not Vacant for not to exceed ten (10) consecutive months.

It is admitted that the citrus fruit packing house was not operated for a period of time greater than ten (10) consecutive months prior to the fire on October 10, 1954. [82] If the fire had occurred within ten months of the issuance of the policies a different question might arise.

One of the contentions made by the plaintiff is that liability was not suspended because the premises were not insured as a fruit packing plant. Plaintiff refers to the fact that in none of the poli-

cies of insurance is there a complete description of the packing plant; it is not described with specificity as a fruit packing plant. Both the insurer and the insured knew that it was not operating thus making the occupancy clause inoperative.

There is no dispute that the property including machinery and equipment was geared for operation as a citrus fruit packing plant. It had in fact in the past been used as such. The contention made by the plaintiff that the description of the premises on the individual insurance policies is controlling is without merit in that the subject of insurance was as a matter of fact a fruit packing plant and under such circumstances it is proper to look at the subject of insurance rather than the title on the respective insurance policies. The status of the insurance is not changed by a description on the policy.

A contract should be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting [Cal. Civ. Code §1636] and a fire insurance policy should be construed in like manner to cover the subject matter intended. Appleman, Insurance Law & Practice, Vol. 4, p. 174. A "packing house" is used to pack "something," in this case citrus fruit and a common-sense interpretation of the contract results in it being a policy to insure a fruit packing plant. [See Cal. Civ. Code §1644].

The other contentions of the plaintiff have greater merit. He urges that the premises were occupied as contemplated [83] by the parties and the defend-

ants have waived their right to assert, or should be estopped from asserting the occupancy provision.

The factual basis for this argument is that Truman Stivers knew that the citrus plant was not operating and informed the plaintiff "that unless he would keep somebody on the property his insurance would be in jeopardy \* \* \* and he should try and keep somebody in there living on the premises." [Reporter's Transcript p. 99] Relying on this statement and to keep the insurance effective the plaintiff obtained a family, Mr. and Mrs. Morris and their son, to live in a trailer alongside the plant. This was not living on the insured premises. (See *Rossini vs. St. Paul Fire & Marine Insurance Co.*, 188 P. 564; also *Words & Phrases*, Permanent Edition, Vol. 33, p. 353).

Assuming without deciding that the agent, Truman Stivers, had authority, either actual or ostensible, as to two of the policies to permit this substitution of conditions without having a written endorsement attached to the policy, this court finds that the substituted condition was not complied with. From the testimony at the time of trial there is no doubt that the requirement of having someone living on the premises was not fulfilled, The trailer was at least 50 feet from the plant and neither Mr. nor Mrs. Morris had a key to any of the buildings. In addition, Mrs. Morris testified that on the day of the fire no one was present on the premises because they were all at work, which was their customary practice.

This is not the type of case where a party relied on an agent's statements waiving a condition of an insurance policy. The plaintiff was apprised of the fact that his insurance would "be in jeopardy" unless a stated condition was complied with, and from all the facts there is no doubt that the [84] requirement was not met. The premises were not occupied as contemplated by the parties.

This determination is dispositive of the case. It is not necessary to determine whether or not Truman Stivers was a general agent, which I seriously doubt, and whether he had sufficient authority to waive the occupancy clause.

Judgment is for the defendants, and counsel for the defendants is ordered to submit proposed findings and conclusions of law in accordance with Local Rule 7.

Dated: This 25th day of April, 1956.

/s/ BEN HARRISON,  
Judge.

[Endorsed]: Filed April 25, 1956. [85]

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[Title of District Court and Cause.]

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 21st day of February, 1956, the above-entitled action came on regularly for trial, before the above-entitled Court, Judge Ben Harrison, pre-

siding, and sitting without a jury, and was heard by Judge Ben Harrison on February 21 and 22, 1956, Harwood Stump, Esq., appeared as attorney for plaintiff Morgan A. Stivers, and Augustus Castro, Esq., appeared as attorney for Defendants National American Insurance Co., a corporation (hereinafter referred to as "National"), Girard Insurance Company of Philadelphia, Pennsylvania, a corporation (hereinafter referred to as "Girard"), the Insurance Company of the State of Pennsylvania, a corporation (hereinafter referred to as "State"), and Queen Insurance Company of America, a corporation (hereinafter referred to as "Queen"). Oral and documentary evidence was introduced, and the matter having been fully argued by the respective parties and submitted for decision, and the Court being fully advised in the premises, and having written and filed herein its written [86] Memorandum Opinion, dated April 25, 1956, after full consideration and due deliberation, finds the facts of said cause to be as follows:

### Findings of Fact

#### I.

It is true that at all times hereinafter mentioned:

- (a) Plaintiff was a citizen of the State of California;
- (b) Each of the defendants, National, Girard, State and Queen, was a corporation duly organized and existing under the laws of a state other than California, and each of said defendants National, Girard, State and Queen was duly authorized under

the laws of the State of California to transact an insurance business in the State of California;

(c) The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

## II.

It is true that at all times hereinafter mentioned:

(a) General Adjustment Bureau, Inc., a corporation, was authorized by each of said defendants to determine the actual cash value of the buildings and personal property involved in that certain fire hereinafter mentioned and the amount of loss to such property;

(b) Roy A. McMillin was licensed by the State of California as an insurance agent and authorized as an agent by and on behalf of defendants Queen and State in Altadena, California; and Truman B. Stivers was not an agent of defendant Queen or State.

(c) Truman B. Stivers was licensed by the State of California as an insurance agent and was an agent of defendants National and Girard in Pasadena, California;

(d) Truman B. Stivers was a nephew of plaintiff, and authorized as an agent by and on behalf of plaintiff to handle the insurance hereinafter mentioned of plaintiff.

## III.

It is true that at all times hereinafter mentioned plaintiff [87] was the owner in fee of the hereinafter mentioned citrus fruit packing house and loading platform, bunk house and storage building,



the machinery, equipment, field supplies and boxes, all situated at Sides Station, 3 miles north of Lindsay, Tulare County, California.

IV.

It is true that at the request of plaintiff, through his agent Truman B. Stivers, on or about the 18th day of November, 1952, at Pasadena, California, in consideration of a premium, National issued to plaintiff a standard California form of fire insurance policy No. 70997, and attached thereto extended coverage endorsement SFBF 202, building, equipment and stock form No. 78, wherein the named insured was Morgan A. Stivers, dba Stivers Packing Company, whereby National insured plaintiff against loss or damage by fire in the amount of \$10,000 as follows:

\$5,000 for said packing house and loading platform;

\$1,500 for said stock consisting principally of field supplies and boxes;

\$2,000 for said bunk house; and

\$1,500 for said storage building.

V.

It is true that at the request of plaintiff, through his agent Truman B. Stivers, on or about the 1st day of December, 1952, at Pasadena, California, in consideration of a premium, Girard issued to plaintiff a standard California form of fire insurance policy No. 2702, and attached thereto extended coverage endorsement, building equipment and stock

form No. 78, wherein the named insureds were plaintiff and Raymond D. Stivers, dba Stivers Packing Company, and attached thereto a lender's loss payable endorsement, making loss payable, first to Farmer's and Merchant's Bank of Long Beach, and insured plaintiff and said Raymond K. Stivers in the amount of \$10,000 as follows:

\$5,000 for said packing house and loading platform;

\$5,000 for said equipment. [88]

#### VI.

It is true that at the request of plaintiff, through his agent Truman B. Stivers, acting as the agent of plaintiff, on or about the 1st day of December, 1952, at Altadena, California, State, in consideration of a premium, issued a standard California form of fire insurance policy No. 101260 and attached thereto an extended coverage endorsement, loss payable endorsement, and building, equipment and stock form No. 78, making the loss payable, first to said Farmer's and Merchant's Bank of Long Beach, whereby State insured plaintiff against loss or damage by fire in the amount of \$7,500 as follows:

\$3,000 for said packing house and loading platform;

\$2,500 for said equipment;

\$1,500 for said stock; and

\$500 for said storage building.

#### VII.

It is true that at the request of plaintiff, through

his agent Truman B. Stivers, on or about the 1st day of December, 1952, at Altadena, California, in consideration of a premium, Queen issued a California form standard fire insurance policy No. 101260 and attached thereto extended coverage endorsement, building, equipment and stock form No. 78, loss payable endorsement with the loss payable, first to said Farmer's and Merchant's Bank of Long Beach, whereby Queen insured plaintiff against loss by fire in the amount of \$12,500, as follows:

\$5,000 for said packing house and loading platform;

\$5,000 for said equipment;

\$2,000 for said stock; and

\$500 for said storage building.

#### VIII.

It is true that through mistake the name of said Raymond K. Stivers was included as a named insured under said insurance policy of said Girard, and that prior to the issuance of said policy said Raymond K. Stivers had transferred all his right, title [89] and interest in and to said buildings and personal property, and did not have an insurable interest in either said buildings or personal property at the time of said fire.

#### IX.

It is true that prior to said fire said Farmer's and Merchant's Bank of Long Beach was paid in full and released all its interest in and to said insurance contracts and said Farmer's and Mer-

chant's Bank of Long Beach was not a loss payee under any of said insurance policies at the time of said fire.

### X.

It is true that on the 13th day of October, 1954, and while said insurance was suspended, a fire originated in said citrus fruit packing house and destroyed said packing house and loading platform, equipment, stock and said storage building.

### XI.

It is true that at the time of said fire said citrus fruit packing house and loading platform was of a cash value in an amount in excess of \$18,000, said equipment was of a cash value in an amount in excess of \$12,500.00, said stock of field boxes and supplies was of a cash value in an amount in excess of \$5,000.00 and said storage building was of a cash value in an amount in excess of \$2,500.00; and that plaintiff's loss and damage by reason of said fire was in excess of said sum of \$18,000.00 on account of said packing house and platform damage, said sum of \$12,500.00 on account of said equipment damage, said sum of \$5,000 on account of said stock, field boxes and supplies and said sum of \$2,500.00 on account of said storage building damage.

### XII.

It is true that each of said defendants extended said plaintiff's time within which to file a written Proof of Loss to and including the 15th day of January, 1955, and that on or about December 21,

1954, plaintiff filed a written Proof of Loss with each of said [90] defendants.

XIII.

It is true that each of said California standard fire insurance policies provided, in part, as follows:

(a) Lines 28 to 34 of said policy:

“Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto, this company shall not be liable for loss occurring \* \* \*; or (b) while a described building, whether intended for occupancy by owner or tenant, is vacant or occupied beyond a period of 60 days; \* \* \*”

(b) Paragraph 21 of said Building, Equipment and Stock form provides, in part, as follows:

“Vacancy-Unoccupancy Clause: Permission is granted to remain vacant or unoccupied without limit of time, Except As Follows: \* \* \*; (2) if the subject of insurance (whether building or contents or both) is a cannery, fruit, nut, or vegetable packing or processing plant \* \* \* permission is granted (a) to remain vacant not to exceed sixty (60) consecutive days, and (b) to remain unoccupied but not Vacant for not to exceed ten (10) consecutive months.”

(c) Lines 149 to 152 of said California standard fire insurance policy provide, in part, as follows:

“Suit: No suit or action on this policy for the recovery of any claim shall be sustainable

in any court of law or equity unless all of the requirements of this policy shall have been complied with \* \* \*”

#### XIV.

It is true that at all times since each of said policies and endorsements were issued to plaintiff, and for more than ten (10) [91] consecutive months prior to said fire plaintiff knew; First, that under the terms of each of said policies and endorsements that in the event said citrus fruit packing house was not operated as a citrus fruit packing house for a period of more than ten (10) consecutive months it would be, and was unoccupied within the meaning of said occupancy provisions, the insurance thereunder would be, and was, suspended during the period it was not in operation in excess of said ten (10) consecutive months; and, Second, that neither said policies nor endorsements provided for a watchman at the premises in lieu of said occupancy.

#### XV.

It is true that said citrus fruit packing house was unoccupied for more than ten (10) consecutive months prior to said fire and at the time of said fire the insurance under each of said insurance contracts was suspended by reason of such unoccupancy in excess of ten (10) consecutive months.

#### XVI.

It is untrue that defendant Queen or State waived said unoccupancy provisions or released or discharged plaintiff from compliance with said un-

occupancy provisions of said insurance contracts; further, it is untrue that defendant Queen or State is estopped from asserting said unoccupancy provisions of said insurance contracts.

XVII.

It is untrue that plaintiff hired or maintained a watchman on said premises at all times after the issuance of said policies and until said property was destroyed by fire.

XVIII.

It is true that said premises were not occupied as contemplated by plaintiff and National, Girard, State or Queen under said insurance contracts for more than ten (10) consecutive months prior to or at the time of such fire.

XIX.

It is true that neither said loss nor any part thereof has been paid by National, Girard, Queen or State. [92]

XX.

It is untrue that Raymond K. Stivers, Howard Stivers or said Farmer's and Merchant's Bank of Long Beach is a real party in interest herein.

Conclusions of Law

As a conclusion of law the Court determines:

1. Each of said insurance contracts insured such citrus fruit packing house as a citrus fruit packing house within the contemplation of the plaintiff and

each of said defendants National, Girard, Queen and State.

2. The fire insurance under each of said insurance contracts was suspended at the time of said fire and loss because said citrus fruit packing house was unoccupied for a period of more than ten (10) consecutive months prior to said fire, and plaintiff did not comply with any agreement on his part to maintain a watchman on said premises at all times in lieu of the compliance with said unoccupancy provisions of said insurance contracts.

3. Neither defendant Queen nor State waived its right to or is estopped to assert that such unoccupancy in excess of ten (10) consecutive months suspended said insurance prior to and at the time of said fire and loss.

4. Each of said defendants National, Girard, State and Queen is entitled to a judgment that plaintiff take nothing herein, and each of said defendants National, Girard, State and Queen have judgment against plaintiff for its costs incurred herein.

Let Judgment be entered accordingly.

Dated: May 11, 1956.

/s/ BEN HARRISON,  
United States District Judge.

Affidavit of service by mail attached.

Lodged May 2, 1956.

[Endorsed]: Filed May 11, 1956. [93]



In the District Court of the United States, Southern  
District of California, Central Division

No. 18737-BH

MORGAN A. STIVERS,

Plaintiff,

vs.

NATIONAL AMERICAN INSURANCE CO., a  
Corporation, et al.,

Defendants.

### JUDGMENT

The above-entitled cause having been tried before the Court, Judge Ben Harrison presiding, and sitting without a jury, a jury trial having been expressly waived by the respective parties, Augustus Castro, Esq., appeared as attorney for defendants National American Insurance Co., a corporation, Girard Insurance Company of Philadelphia, Pennsylvania, a corporation, The Insurance Company of the State of Pennsylvania, a corporation, and Queen Insurance Company of America, a corporation; and Howard Stump, Esq., appeared as attorney for plaintiff Morgan A. Stivers, oral and documentary evidence having been introduced and fully considered by the Court, the Court having made and filed herein Memorandum Opinion for Judgment for said defendants and thereafter the Court having made and filed and caused to be entered herein its written Findings of Fact and Conclusions of Law, and having ordered judgment to

be entered in favor of each of said defendants,  
Now, Therefore, by reason of the premises,

It Is Hereby Ordered, Adjudged and [94] De-  
creed:

1. That plaintiff take nothing by this action.
2. That each of the defendants National American Insurance Co., a corporation, Girard Insurance Company of Philadelphia, Pennsylvania, a corporation, The Insurance Company of the State of Pennsylvania, a corporation, and Queen Insurance Company of America, a corporation, recover from plaintiff Morgan A. Stivers its costs of suit incurred herein taxed at the sum of \$79.82.

Dated: May 11, 1956.

/s/ BEN HARRISON,

United States District Judge.

Affidavit of service by mail attached.

Lodged May 2, 1956.

[Endorsed]: Filed May 11, 1956.

Docketed and entered May 14, 1956. [95]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Morgan A. Stivers, plaintiff above named, hereby appeals to the United

States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on May 14, 1956.

SIMPSON, WISE &  
KILPATRICK,

HARWOOD STUMP,

HENRY T. LOGAN,

By /s/ GEORGE E. WISE,  
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed June 13, 1956. [97]

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In the United States District Court, Southern  
District of California, Central Division  
No. 18737-BH

Honorable Ben Harrison, Judge Presiding.

MORGAN A. STIVERS,

Plaintiff,

vs.

NATIONAL AMERICAN INSURANCE COMPANY, a Corporation; GIRARD INSURANCE COMPANY OF PHILADELPHIA, PENNSYLVANIA, a Corporation; THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, a Corporation; QUEEN INSURANCE COMPANY OF AMERICA, a Corporation; and DOES I TO X, Inclusive,  
Defendants.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Tuesday, February 21, 1956

Appearances:

For the Plaintiff:

MESSRS. HARWOOD STUMP, and  
HENRY T. LOGAN.

For the Defendants:

MESSRS. COOLEY, CROWLEY,  
GAITHER, GODWARD, CASTRO &  
HUDDLESON, by  
AUGUSTUS CASTRO, Esq.

The Court: You may proceed.

The Clerk: No. 18737-Y, Morgan A. Stivers vs.  
National American Insurance Company and others  
for trial.

Mr. Stump: The plaintiff is ready.

Mr. Castro: The defendants are ready, your  
Honor.The Court: Which of you gentlemen is Mr.  
Stump?

Mr. Stump: I am Mr. Stump, your Honor.

The Court: And who is representing the other  
side?

Mr. Castro: Mr. Castro, your Honor.

Mr. Stump: At this time, your Honor, I would  
like to announce associated with me is Mr. Henry  
T. Logan at counsel table.

The Court: Take your order.

As I understand this case, gentlemen, it involves four insurance policies; does it not?

Mr. Logan: Yes.

Mr. Castro: Yes.

The Court: There is really only one issue to be tried; is there not?

Mr. Castro: I think it comes down to about one issue, your Honor.

The Court: In other words, the plaintiff has complied with all the provisions of the policies so far as proof of [5\*] loss is concerned.

Mr. Stump: That is correct, your Honor.

The Court: The defense is that the buildings were unoccupied for more than 10 months.

Mr. Castro: Yes.

The Court: And is that not the real issue?

Mr. Castro: Yes, your Honor.

Mr. Stump: That is correct.

Mr. Castro: And the amount of damage is admitted to the extent of the limits of the policies.

The Court: Why can't we go right into that issue?

Mr. Castro: Yes; I think we may.

Mr. Stump: If it is necessary to reach that issue, your Honor, we have a problem there.

Under the terms of all of the policies, which are identical in terms and are standard California fire insurance policies, the buildings are insured while occupied as a packing house and loading platform. Then an exception is made in the stock form 78 that permission is granted to remain unoccupied

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

without limit of time except if the subject of the insurance is a nut, fruit or vegetable packing plant or processing plant and then permission is granted to remain unoccupied for not to exceed 10 consecutive months.

The question at the outset is, there is nothing on the face of the policies or on the face of the pleadings to show [6] that this insured premises are a nut, fruit or vegetable packing or processing plant and therefore we would come under the provisions of the policies which waives or gives permission to remain unoccupied without limit of time. Nor is there anything in the defendants' answers which alleges affirmatively or otherwise, that the insured premises were a fruit, nut or vegetable packing or processing plant.

Therefore, at that state of the pleading the question is whether or not without an affirmative allegation on the part of the defendants that the premises were a nut, fruit or vegetable packing plant, the question is does not the permission to remain unoccupied without limit of time, attach and therefore we never come to the problem of occupancy on this question.

The Court: Counsel, you can always amend pleadings to conform to the facts. What was the plant used for?

Mr. Stump: It was originally, in 1943 when acquired by the plaintiff, it was an orange packing plant.

During the time that it was used it was so used and our evidence will show that in August of 1949,

several months before the issuance of the initial policies, the plant was closed and remained closed until the time of the fire.

So, on the date of the issuance of the initial policies and three years later on the date of the re-issuance of the renewal policies and one additional new policy, the plant was [7] not occupied as a fruit packing plant and it never had been during the life of either one of those policies.

So, the problem immediately arises: Was it the intention to insure it as a fruit packing plant?

The difference between a packing plant and a fruit packing plant is considerable because if they had intended to insure it as a fruit packing plant it would have so read in the insuring clause of the policies.

The Court: Aren't the questions involved here primarily questions of law or an interpretation of the policies?

Mr. Stump: We come to that issue; yes.

There is a considerable amount of law involved in interpreting what is meant by these policies, but in order for the policies to be given the proper construction it is also, I believe, necessary to apprise the court of the circumstances surrounding the transaction at the time the policies were entered into, so that the court can place itself in the position of these parties making these contracts of insurance.

The Court: Well, to what extent can you stipulate as to the facts in that regard?

Mr. Stump: We are prepared to stipulate, and

I am sure counsel will also, that the plaintiff's plant was not occupied as a fruit packing plant from August 31, 1949, until the date of the fire.

Mr. Castro: That is not the information that I have, [8] counsel. My information is that the last time the packing shed was operated was during 1952—1951-'52 season and not after July 1 of 1952.

Mr. Stump: Well, we are prepared to offer evidence on that. I guess after all we can't stipulate to it. Our evidence will show that the American Fruit Company's lease was terminated on August 31, 1949, and that no other persons operated that plant as a fruit packing plant after that day.

The Court: Is an orange packing plant any different from a fruit packing plant.

Mr. Stump: No, sir. We will stipulate it was an orange packing plant. An orange, I suppose, is a kind of fruit except when it freezes and then I don't know what it is.

The Court: I happen to be interested in an orange grove and I was wondering if we were raising fruit or something else.

I am ready to listen to the facts, gentlemen, and then we will try to straighten out what we consider to be the law of the case.

Mr. Castro: At this time on behalf of each of the defendants, your Honor, I will ask the witnesses be excluded during the taking of testimony.

The Court: If that request is made all witnesses who expect to testify in this case will be required to retire to the witness room. The plaintiff may



remain in the courtroom and you may call your first witness. [9]

Mr. Stump: The plaintiff is our first witness. We will call him at this time.

MORGAN A. STIVERS

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Morgan A. Stivers.

Mr. Stump: Before commencing the interrogation of the witness, your Honor, I would like to clarify one thing and that is we have under subpoena an officer of the Farmers & Merchants Bank of Long Beach. He may not understand that he is a witness and I would like permission to inquire if he is in the courtroom.

The Court: What is the purpose of that witness?

Mr. Stump: For the purpose of proving that the loss payable to the Farmers & Merchants Bank had been paid prior to the issuance of the policy sued on and they have no insurable interest in the premises.

Mr. Castro: If the officer is here and would just state that, your Honor, we would accept it.

Mr. Stump: Is the representative of the Farmers & Merchants Bank here?

(No response.)

The Clerk: Was he subpoenaed to appear in this courtroom or the courtroom across the [10] hall?

(Testimony of Morgan A. Stivers.)

Mr. Stump: He was subpoenaed to appear in Courtroom No. 7.

The Clerk: Then he may be over there.

Mr. Logan: May I have permission to inquire, your Honor?

The Court: Yes. I am curious as to how this case happened to land in the Southern District of California.

Mr. Stump: It was our theory at the time that the policies being purchased here—were issued here; that the insurance proceeds were to be paid here and therefore the proper place was for the action to be filed here.

We filed it in the Superior Court and the defendant did us the favor of moving it to the Federal Court where we could get a hearing much earlier than we would if we had been in the State court. And that is the history on that, your Honor. The property actually is situated at Side Station in Tulare, California.

The Court: That is in the Northern Division.

Mr. Stump: Yes. And all the defendants are foreign corporations.

The Court: You may proceed.

#### Direct Examination

By Mr. Stump:

Q. Will you state your name for the record, Mr. Stivers?

A. Morgan A. Stivers.

(Testimony of Morgan A. Stivers.)

Q. And are you the owner of property at Side Station, [11] three miles north of Lindsay in Tulare County, California?      A. Yes; I am.

Q. Would you mind speaking a little louder, please, so I can hear you?

When did you acquire that property, Mr. Stivers?

The Court: There is no question of ownership; is there, counsel?

Mr. Castro: I do not believe so, your Honor. The only question that I have in that respect is whether his brother, Howard Stivers, has any insurable interest in the property.

Mr. Stump: I will come to that question.

Q. (By Mr. Stump): The title of this property is taken in whose name, Mr. Stivers?

A. Morgan A. Stivers and Virginia E. Stivers, my wife.

Q. Does Howard Stivers have any record interest in this property?      A. No.

Q. Does he have any interest of any kind in the property at this time?      A. No; he does not.

Q. Did he at the time these insurance policies that are being sued on here were taken out?

A. No.

Q. That is December 1, 1952?

A. No; he did not. [12]

Q. He had no interest at that time?

A. No.

Q. Has he had any interest since that time?

A. No.

(Testimony of Morgan A. Stivers.)

Q. Now, did Raymond K. Stivers have an interest in the property after you acquired it?

A. Yes.

Q. And what was that interest?

A. A one-third interest.

Q. Does he still have that interest?

A. No.

Q. When did he dispose of that interest, to your knowledge?

A. I believe it was sometime in 1952 that I bought his interest out from a debt that he owed me.

Q. Was that prior to December 1st of 1952?

A. Yes.

Q. At the time these policies in question were issued Raymond Stivers had no interest in the property; is that your statement?

A. That is right.

The Court: Is this your banker?

Mr. Logan: That is the gentleman.

The Court: If you so desire you may withdraw this witness and put on your banker. [13]

Mr. Castro: This is the agent for——

Mr. Stump: This is your witness.

Mr. Castro: Yes. This man is agent for two of the companies, your Honor. He is not the man from the bank.

The Court: I understood counsel was calling the bank manager or somebody from the bank.

Mr. Castro: That is what I understood.

Mr. Stump: I have had a subpoena served on a

Mr. Wessenberg (phonetic), vice-president of the Farmers & Merchants Bank, and I talked to Mr. Wessenberg and I was assured either he or some representative of the bank would be here. However, apparently, an error was made. We assumed that this gentleman here was that person and he is now on the stand out of order and is a defense witness, so apparently our witness from the bank has not yet arrived, your Honor. And that is the only explanation I can make.

Mr. Castro: May Mr. McMillan be withdrawn, your Honor. It is entirely a mistake.

The Court: Yes. Mr. Stivers will take the stand again.

MORGAN A. STIVERS

a witness called on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Q. (By Mr. Stump): Now, at the time you acquired this property, Mr. Stivers, was there any encumbrance on it? [14]

A. Yes. I gave back a trust deed.

Q. To whom was that trust deed given?

A. To Lowell Washburn, the party I purchased the property from.

Q. Was that trust deed subsequently paid or was it on the property at the time of the issuance of these policies?      A. It was paid off.

Q. Was there any other encumbrance incurred against the property after you acquired ownership?

A. Yes; a loan from the Farmers & Merchants Bank in Long Beach.

(Testimony of Morgan A. Stivers.)

Q. And what was the amount of that loan?

A. \$15,000.

Q. Do you recall on or about when it was incurred, the indebtedness?

A. I believe it was in '48.

Q. And do you know when it was paid, if at all?

The Court: Was that in the form of a trust deed?

The Witness: Yes; trust deed on the property.

The Court: Wouldn't the records show that, counsel—that the encumbrance was satisfied? It should be of record.

Mr. Castro: No; it was not, your Honor. Our review did not disclose it but the bank was, and the plaintiff's request, made a loss payee on three of the policies.

The Court: I mean whether the bank has any claim at [15] this time. If the trust deed has been satisfied then they have no claim.

Mr. Castro: There was never—we could not ascertain from the bank—the bank refused to disclose to us their indebtedness.

The Court: What I am getting at is that the records of Los Angeles County should disclose that.

Mr. Castro: We did not find any trust deed recorded in Tulare County covering this property to the Farmers & Merchants Bank.

The Court: We will have to wait for the banker then.

Mr. Stump: I might say this, your Honor. I

(Testimony of Morgan A. Stivers.)

have shown counsel the original policies with the mortgagee loss payable clause on them which shows a written release on them by the bank, but of course counsel does not know that the bank actually put that on there until we bring someone in from the bank to so testify.

At this time I am attempting to have Mr. Stivers state that the obligation was paid.

The Witness: It was paid off in December of 1951.

Q. (By Mr. Stump): December of 1951?

A. Yes.

Q. And these policies here sued on were issued on or about December 1st of 1952; is that right?

A. Yes. [16]

The Court: What was the date of the fire?

Mr. Stump: The date of the fire of Mr. Stivers' property?

The Witness: October 13, 1954.

Q. (By Mr. Stump): Now, did Howard Stivers have any interest in this property? A. No.

Q. That is at the time of taking out of the policies he had no interest in the property?

A. No.

Q. Now, Mr. Stivers, what was the nature of these insured premises, the general nature of them?

A. It was an orange packing house, bulk house and loading platform and a storage building, cull bin and all the equipment and machinery necessary to operate a packing house.

Q. You say these premises burned on October

(Testimony of Morgan A. Stivers.)

15, 1954; is that right?      A. Yes.

Q. And what—well, actually the amount of the structure is not in issue. I will withdraw the question.

Now, did you at any time apply for insurance on these premises?      A. Yes.

Q. And do you recall whom you made your application to?      A. Truman Stivers. [17]

Q. He is your nephew?      A. Yes.

Q. Do you know about when you made your first application to him for insurance?

A. Well, on this property I believe it was in 1949.

Q. And prior to that had you had—did you have insurance on the property through another agent?

A. Yes; another agent at Lindsay, California.

Q. And at the time you made application to Truman B. Stivers for the insurance in 1949 were you packing oranges at this plant?      A. No.

Q. How long prior to that time had it been since you had packed oranges or anything at this plant?

A. Well, it was at the expiration of the American Fruit's lease which expired August 16, I believe it was, in 1949.

Q. During the time the American Fruit Company were in the plant, in occupancy, they had packed oranges and fruit in the plant; is that right?

A. Yes.

Q. Now, since the American Fruit Company left in August of 1949 has there been any fruit packed in this plant?      A. No; there has not.



(Testimony of Morgan A. Stivers.)

Mr. Stump: At this time, your Honor, I want to have the witness identify four policies that were issued and then [18] offer them into evidence.

This being my first appearance in the Federal Court I don't know whether I am permitted to approach the witness or not.

The Court: You may.

Mr. Stump: Thank you.

Mr. Castro: It will be stipulated, your Honor, that those are the four policies together with the endorsements, and they may be marked as exhibits if your Honor so orders it.

The Court: They will be introduced as the first four exhibits to the plaintiff's case. Hand them to the clerk and he will mark them.

Mr. Stump: May I request the American National Policy be offered as Plaintiff's No. 1?

The Clerk: Plaintiff's Exhibit 1.

(The exhibit referred to, marked Plaintiff's Exhibit No. 1, was received in evidence.)

Mr. Stump: Girard Insurance policy as Plaintiff's No. 2.

The Clerk: Plaintiff's Exhibit 2 in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 2, was received in evidence.)

Mr. Stump: The Insurance Company of the State of Pennsylvania as Plaintiff's Exhibit No. 3.

The Clerk: No. 3 in evidence. [19]

(Testimony of Morgan A. Stivers.)

Mr. Stump: And the Queen Insurance Company as Plaintiff's Exhibit No. 4.

The Clerk: Plaintiff's Exhibit 4 in evidence.

(The exhibit referred to, marked Plaintiff's exhibit 4, was received in evidence.)

Q. (By Mr. Stump): Now, Mr. Stivers, prior to December 1st of 1952 do you recall what insurance you had on the premises and with what companies you had this insurance?

The Court: You are not claiming any more insurance than is represented by these four policies, are you?

Mr. Stump: Well, your Honor, three of the companies whose policies are here had insurance prior to December 1 of 1952. One company that held a policy at that time, Fulton Insurance Company, did not renew. A new company came in, the National American Insurance Company, which is Plaintiff's Exhibit No. 1.

At this time I want to put that into evidence as background for certain arguments on this issue of estoppel or waiver.

Mr. Castro: The policies should show on their face whether or not they are new or renewal policies. That is normally stated on the face of the policy.

Mr. Stump: I believe it does.

At this time then I assume that counsel will stipulate that the policies of all but the National American Insurance [20] Company were renewal policies

(Testimony of Morgan A. Stivers.)

since it shows on their face that they were such.

Mr. Castro: I think that is correct.

Q. (By Mr. Stump): Now, Mr. Stivers, at the time you made application to Truman D. Stivers for the renewal of these policies—for the policies which are here being sued upon, do you recall the circumstances or what occurred at that time?

A. I believe that Truman Stivers called my office and told us that they were coming up for renewal.

Q. That was some time—do you recall about when that was? A. I believe it was in October.

Q. Of 1952?

A. Yes; 1952. And the policy was coming up for renewal, I believe, in December of '52.

Q. And at that time did you—was the packing plant in operation? A. No.

Q. As a fruit packing plant?

A. No; it wasn't. It was only occupied by the person living on the property.

Q. You mean that there were persons living on the property? A. Yes.

Q. But the property was not actually operating as a [21] fruit packing plant at that time?

A. No.

Q. Did you advise Mr. Truman Stivers the amount of insurance coverage that you wanted at that time? A. Yes; \$40,000.

Q. And did you advise him as to anything else concerning the insurance at that time?

A. Well, that the packing house wasn't in operation.

(Testimony of Morgan A. Stivers.)

Mr. Castro: As to that, your Honor, I move to strike as to the defendant Queen Insurance Company and Insurance Company of the State of Pennsylvania on the ground that it is hearsay since Mr. Truman B. Stivers was not an employee or agent or representative of either of those two defendants at any time.

The Court: I don't know yet.

Mr. Castro: Well, I am making the objection. There is no proper foundation being laid so far as those two companies are concerned and is hearsay testimony.

The Court: Counsel, I realize there are some legal points involved but I think I should have the facts.

Mr. Castro: Yes; I do, too, your Honor.

The Court: I will overrule the objection at this time, reserving you the right to make a motion to strike.

Mr. Castro: Thank you, your Honor.

Q. (By Mr. Stump): Now, Mr. Stivers, of your knowledge, [22] was Truman B. Stivers acquainted with this property in Lindsay?

Mr. Castro: Object to that as calling for his conclusion and opinion.

The Witness: Yes.

Mr. Castro: Calling for his opinion and conclusion and not for a fact—concerning another man's knowledge.

The Court: As I understand, you said this man was your nephew?

(Testimony of Morgan A. Stivers.)

The Witness: Yes, sir.

The Court: Where did he have his office?

The Witness: Pasadena.

The Court: Have you ever seen him around the packing house?

The Witness: Oh, yes; lots of times. He owned property around Lindsay and he was up there often and stopped by the packing house.

Q. (By Mr. Stump): You had seen him on the packing plant property, had you, prior to the issuance of these policies? A. Yes.

Q. And were his trips—was that on more than one occasion?

A. Yes; I saw him there a number of times.

Q. And you know of your own knowledge that he owned property in that area himself and was frequently up in that vicinity; is that right? [23]

A. Yes.

Q. Now, did you ever have any discussion with Mr. Truman Stivers or with his office, regarding the operation of that packing plant prior to the issuance of these policies that are here being sued on?

A. Yes. I had talked to him several times and he had with me that the packing house wasn't in operation.

Mr. Castro: Just a moment. May I interrupt, your Honor, to interpose the same objection that I did on behalf of the defendant Queen—

The Court: Counsel, I recognize there is a close point as to the limitations of an agent of an insurance company that sells insurance and that of being

(Testimony of Morgan A. Stivers.)

a representative of the company; but I think the court should have the facts from which I can draw a conclusion as to whether or not he had certain information. Now, whether that information is information of the company is a different thing.

Mr. Castro: Yes, your Honor. Rather than interpose these objections each time perhaps counsel will stipulate——

The Court: Are you going to have the agent here?

Mr. Stump: He will be the next witness up, your Honor.

I will stipulate with counsel if the court finds that Truman B. Stivers was not an agent of any one of these companies, that as to that company the conversation between Morgan Stivers and Truman B. Stivers would have no import—would [24] impart no knowledge to them—would not be binding on them.

Mr. Castro: I will accept that stipulation, your Honor.

Mr. Stump: This is sort of like a circle. We have to hop on the rim somewhere in order to start.

The Court: I realize that, counsel.

Q. (By Mr. Stump): Now, Mr. Stivers, will you state whether or not Mr. Truman Stivers ever called you concerning the operations of this packing plant prior to the issuance of these policies?

A. Yes; the first time that——

Mr. Castro: I think the question has been answered.

(Testimony of Morgan A. Stivers.)

The Witness: I talked to him about the insurance, oh, it was back in '49 when he asked—he was at the packing house and asked me about rewriting the insurance that was coming up and that was held by the Lindsay Company and which I told him he could write because he had been our agent since he had his license of taking care of all of our insurance.

Q. (By Mr. Stump): Now, between the time of writing these first policies and the time of renewing some of the policies and writing a new policy, did he have any contact with you or talk to you about the operating of the packing plant?

A. Yes. We talked about it but he knew it wasn't in operation; which it wasn't.

Q. Well, now, you tell us about when this conversation [25] took place, if you recall.

A. After he had placed the policies.

Q. The first time and before they were placed the second time?

Mr. Castro: Object to that as leading and suggestive.

Mr. Stump: I am trying to lay a foundation for a conversation, your Honor, some time within a period of time. This is a nephew of the witness and they no doubt had many conversations.

I didn't intend to lead him, counsel. I am merely trying to assist him to give us the conversation.

The Court: We haven't a jury here.

Mr. Castro: I realize that, your Honor. I examined this man under oath a year and a half ago

(Testimony of Morgan A. Stivers.)

and I know what his answers were then and I don't think he should be led at this time.

The Court: Try not to lead, counsel.

The Witness: I talked to Truman Stivers several times during that time about the packing house.

Q. (By Mr. Stump): Do you recall on or about the time of the first conversation?

A. (No answer.)

Q. Can you fix it in your mind as to a month or year?

A. Well, I would say it was along some time in '50, 1950 I will say, the first part of 1950. [26]

Q. And where did the conversation take place?

A. I believe that was at the packing house.

Q. Were you at the packing house, both of you, at the time? A. Yes.

Q. Now, will you tell the court——

The Court: Was the packing house in operation at that time?

The Witness: No; it was not in operation. We were talking about it—that we didn't know when we would ever be operating it again and I believe he said at that time——

The Court: Are you having as much trouble in the orange industry up north as we do down south?

The Witness: More. In 1948 and 1949 we had practically a total freeze and the trees were damaged some and we sold most of the groves.

We were packing our own fruit before when we leased to the American Fruit Company.

Q. (By Mr. Stump): At the time of this con-



(Testimony of Morgan A. Stivers.)

versation, Mr. Stivers—I am sorry but I can't hear you, sir, when you answer. If you will tell us what this conversation was.

A. Well, the best I recall it was about the—we weren't going to operate the packing house any more and I told him of course that we didn't know whether we would ever operate it any more and I believe he said at that time, "You will have [27] to keep someone on the property if it is not in operation," which we did have someone living on the property and had them there all the time.

Q. You thereafter had someone living on the property, is that what you said?      A. Yes.

The Court: Which part of the property?

The Witness: Well, living at the packing house. He told me that for our insurance to be in force that there had to be someone living on the property.

Q. (By Mr. Stump): Now, Mr. Stivers, will you explain to the court where you had this person or persons living on the property?

Mr. Castro: This is immaterial except as to the time of the fire, your Honor. This goes back to 1950.

Q. (By Mr. Stump): Well, at the time of the fire then, Mr. Stiver—I will withdraw the other question, Mr. Stivers.

At the time of the fire who was living there?

A. At the time of the fire the fellow we had on the property was living in his trailer there right beside the packing house and which some of his stuff burned in the fire. He set his trailer close to the

(Testimony of Morgan A. Stivers.)

packing house in order to hook up to the sewer and the electricity.

Q. Now, did you have any conversation with Truman B. Stivers after this one early in 1951, I think you said, or [28] 1950. I am not sure of those dates. Did you have any other conversations respecting the operating of the packing house after that first conversation that you have testified to?

A. Yes. I would say several different times because he was up and around Lindsay every few days and I was too along about that time and we would have a discussion about the packing house. I don't know what dates but a number of times.

Q. Now, Mr. Stivers, during the 10 months preceding the destruction by fire of these premises in 1954, had you been at the packing plant?

A. Yes, I was by there a couple of months before that time.

Q. And was anything done at that time?

A. Yes. There was some work being done on the packing house which I had helped one day with some other fellows putting a new roof on and some other repairs.

Q. What were the other repairs?

A. Well, the doors and windows and floor and they were doing some work on the equipment.

Q. By the "equipment"—was there any special equipment, any particular equipment that you recall you repaired?

A. Well, on the conveyor belts and stuff like that.

(Testimony of Morgan A. Stivers.)

Q. And you testified that yourself and others were there repairing it, is that correct? [29]

A. Yes.

Q. Now, about when in reference to October 13, 1954, was that?

A. I would say around the middle of August. Then there was some other work done on it after I was up there by some of my brother's men and our foreman that we did in seeing after our groves.

Mr. Stump: I take it, counsel, there is no need of going into proof of loss—that is all admitted.

Mr. Castro: That is all admitted in the pleadings.

Q. (By Mr. Stump): Now, Mr. Stivers, subsequent to the fire have you ever received any money from these defendants in payment of your loss? A. No, I have not.

Q. And have you made demand on them for payment?

The Court: There is no dispute about that, counsel.

Mr. Castro: None that I know of.

The Witness: Yes.

Mr. Stump: I think that is all we have of this witness at this time, your Honor.

The Court: Cross-examine.

#### Cross-Examination

By Mr. Castro:

Q. Mr. Stump, your nephew is Truman B. Stivers? A. Yes. [30]

(Testimony of Morgan A. Stivers.)

Q. And he became an insurance agent and went into the insurance business, did he, eventually?

A. Yes, he did and he wrote practically all of our insurance for several years.

Q. And he acted as an agent for you, did he, in taking care of your insurance?      A. Yes.

Q. And that is true up to the time of this fire and up to the present time, I assume?

A. Yes.

Q. Now, at the time of the—strike that.

At the time these policies were issued in December of 1952, were you in a partnership agreement with Howard Stivers?

A. Not on the packing house, no.

Q. Did you have a partnership agreement with him?

A. We only have a verbal partnership agreement on the other business but not in the packing house.

Q. But your partnership agreement did not relate in any way to the Lindsay packing operations?

A. No.

Q. Or the property?      A. No.

Q. Now, you have some other business, do you, that you follow besides the packing shed?

A. Yes, building business. [31]

Q. And that is located at Long Beach?

A. Yes.

Q. And that is the business in which Howard is a partner?      A. Yes.

Q. Now, you originally packed your own orange

(Testimony of Morgan A. Stivers.)

crop in the shed, did you not?      A. Yes, we did.

Q. And you packed in the shed until sometime—you packed your own crop until sometime in about 1949 or '50?

A. Well, I believe it was in 1947 when the American Fruit packed there for two years.

Q. You discontinued your own packing?

A. Yes.

Q. And then you leased it out to the American Fruit Company?      A. Yes.

Q. Now, what type of crop of oranges was being packed there—was it a navel and Valencia crop?

A. Navels and Valencias and some grapefruit.

Q. What was the season for the Valencia packing season?

A. Well, the season in that district usually runs—of course it depends on the weather and the test of the fruit, but it usually runs from the 1st of April to the latter part of June. [32]

Q. And on the orange crop—the navel crop, what is the general period for the season in that district?

A. Oh, around the 1st of November to—it depends on the season and the test of the fruit, but generally up until as late as the latter part of March.

The Court: I know they are ahead of the Southern California growers in marketing their crops.

Q. (By Mr. Castro): Now, you have referred to being at the shed before the fire. The last time

(Testimony of Morgan A. Stivers.)

you were at the shed was about two months before the fire?      A. Yes.

Q. And at the time of the fire the shed was not in use, so far as packing was concerned?

A. No.

Q. Now, you have mentioned a trailer which was at the shed on the day of the fire. Do you know who the owner of that trailer was?

A. Mr. Morris (phonetic), the fellow that we had on the property.

Q. Morris?

A. Yes, that lived in the trailer, he and his wife and his son.

Q. Now, did Mr. Morris have a job outside of that during the day?

A. I don't remember now whether he had a part-time job. [33] His wife and his son, they were all there, I understood, practically all the time—either one of them was.

Q. Well, you don't have any personal knowledge as to whether or not he was there, or any member of his family, on the day of this fire, do you?

A. Yes.

Q. Were you there on the day of the fire?

A. No.

Q. Were you in Long Beach on the day of the fire?      A. Yes.

Q. And did you go to Lindsay on the day of the fire?      A. No, I didn't.

Q. You personally didn't see Mr. Morris or any member of his family there on the day of the fire, did you?

(Testimony of Morgan A. Stivers.)

A. No. Truman Stivers, my agent, called. He happened to be at Lindsay and he called me and told me the packing house was burning and it had burned——

Mr. Castro: I move to strike the answer as hearsay.

The Witness: ——and it burned part of Mr. Morris' furniture.

The Court: I recognize that, counsel.

Q. (By Mr. Castro): Now, did you tell Mr. Morris or his wife or his boy that they had to spend any particular hours at the packing plant?

A. No. I didn't talk to them. My cousin was our [34] foreman up there.

Q. You didn't personally?

A. He made the arrangements with them and I told him that there had to be someone on the property all the time, which he said either one of his family was there at all times.

Q. You told your foreman that there had to be someone on the property at all times?

A. Yes.

Q. Now, did you know prior to this fire that your insurance would be jeopardized if the property was not being operated as a packing plant?

A. No, because Truman Stivers at the time the policies were placed on there and long before that, that there had to be someone living on the property and which we had someone living there.

Q. Isn't it a fact you knew that if the property

(Testimony of Morgan A. Stivers.)

wasn't being operated as a packing plant that your insurance would be jeopardized?

A. No. I understood from him that as long as there was someone on the property, living on the property—

Q. Do you recall, in December of 1954, that I came to your office in Long Beach with a reporter and notary public and I asked you questions?

A. Yes.

Q. On the subject of this loss? [35]

A. Yes.

Q. And thereafter the document was—the testimony was transcribed and the original was forwarded to you and you signed it? A. Yes.

Q. Now, when was the first time you had a conversation with Mr. Stivers, with Truman B. Stivers concerning the fact you were not going to operate the packing plant?

A. Well, I think I stated before it was along in 1949.

Q. And did you have more than one conversation with him? Was there more than one time when you had such a talk with him?

A. Yes, a number of times. [36]

Q. Isn't it a fact that you didn't tell Mr. Stivers, Truman B. Stivers, in 1949, that the plant was not to be operated as a packing shed either by you or anybody else?

A. What was the question?

Mr. Castro: Read the question.

(Question read.)



(Testimony of Morgan A. Stivers.)

The Witness: You are refreshing my memory about this since the hearing in Long Beach that I do remember conversations with Truman along at that time.

Q. (By Mr. Castro): You say someone has refreshed your memory?

A. Since December, 1954, I have refreshed my own memory.

Q. How did you refresh your memory, Mr. Stivers?

A. Well, after you were down that day, I got thinking about the packing house and how long it had been since it was operating, and the times Truman Stivers and also his father talked about it a number of times we visited together in Lindsay.

Q. You knew, did you not, prior to talking to Truman B. Stivers, that you had to have a watchman on the property in order to keep your insurance?

A. Not until he told me.

Q. Isn't that the reason you brought it up with Truman B. Stivers? [37]

A. No. He told me what we would have to have, someone living on the property.

Q. You had no knowledge of that subject until he told you?

A. No, I don't recall any reason why, only that he told me there would have to be someone on the property.

Q. But you didn't have any knowledge on that subject apart from what Truman B. Stivers told you?

A. I don't believe so.

(Testimony of Morgan A. Stivers.)

Q. Isn't it a fact that you only talked to Truman B. Stivers on one or possibly two occasions concerning this subject matter?

A. No. As I stated before, I talked to him a number of times. He was in Lindsay a lot and I was up there quite a lot, and we visited together in Long Beach. The family visited together a lot.

Mr. Castro: May I show this witness a statement?

The Court: Can't you stipulate that you can read the statement without going through all that rigamarole, what his testimony was at that time?

We will take our morning recess of five minutes at this time.

(Recess.)

The Court: You may proceed.

Mr. Stump: Your Honor, at the time of the recess [38] Mr. Morgan Stivers was on the stand under cross-examination by Mr. Castro. I have a problem which I discussed with Mr. Castro. One of our witnesses, whose testimony will be very short, is under subpoena to appear in a criminal matter at 2:00 o'clock this afternoon in Pasadena. He has kindly consented that we could put her on now and get her out of the way, if that is agreeable to the court.

The Court: That is satisfactory.

Mr. Stump: We will call Mrs. Florence Woods.

The Court: You may step down, Mr. Stivers.

We are moving along at an awfully slow rate of speed this morning.

Mr. Stump: Your Honor, we will try to speed it up. I regret the delay.

FLORENCE WOODS DINES

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Florence Woods Dines.

Direct Examination

By Mr. Stump:

Q. Mrs. Dines, what is your occupation?

A. I am general office manager for Truman Stivers.

The Court: You will have to speak up louder than that.

The Witness: I am sorry. I am general office manager [39] for Truman Stivers.

Q. (By Mr. Stump): How long have you worked for him, how long have you worked for him in that capacity? A. Since 1946.

Q. And that office is located where, Mrs. Dines?

A. 2674 East Walnut Street, Pasadena.

Q. As a part of your duties, do you take applications for insurance for Mr. Truman Stivers?

A. Yes, sir, I do.

Q. In the usual course of your business, how are those applications taken?

(Testimony of Florence Woods Dines.)

A. The applicant can call on the phone and I will take the information. I can relay it by telephone to our general agent either in Los Angeles or located there in Pasadena.

Q. Do you in the process of placing insurance call the insurance companies?

A. Yes, we do.

Q. Do you recall policies of insurance being made to Morgan Stivers relative to a packing plant property in Lindsay, California?

A. Yes, sir.

Q. Do you know on or about when that was?

A. We have an expiration file—or are you talking about the original policy? [40]

Q. No. Will you just tell us what you know about it at this point?

A. We take applications and write the policies, and when the—I mean the Los Angeles office or the main office, general office of the insurance company writes the policy, we process the signing of the policy and sending the bill and making the account receivable, and also an expiration notice. On the expiration notices, they are filed and 60 days before those policies become due again, we usually contact the assured, stating that the policy is becoming due, and we will renew the policy for them.

Q. Now, do you have any recollection of that procedure being followed in the case of the policies with the Girard, Queen, and State of Pennsylvania as to the packing plant property?

A. Yes, sir.

(Testimony of Florence Woods Dines.)

Q. Do you know on or about when it came to your attention that the then existing policies were expiring?

A. Approximately 60 days before they expire, sir, which would have been December 1, 1952, we pulled the expiration and contacted the assured for a renewal on that policy.

Q. Do you recall what took place—you say you did contact the assured?

A. Yes, the assured's office. [41]

Q. You personally contacted the assured's office? A. That's right.

Q. Do you recall the conversation that took place at that time?

A. I called the assured's—

Mr. Castro: Just a moment. That is hearsay again as to the defendants Queen and Insurance Company of the State of Pennsylvania.

The Court: I will make the same ruling I made before, counsel.

Mr. Castro: Yes, your Honor.

The Witness: I contacted the assured's office and advised them how much insurance they had and asked his secretary to see if the amount was okay and give us an order for the renewal.

Q. (By Mr. Stump): Whom did you talk to in the assured's office?

A. Mrs. Zimmerman.

Q. Did she inform you at that time how much coverage, if any, Mr. Stivers wanted on the packing plant?

(Testimony of Florence Woods Dines.)

A. She said she would call back and she did.

Q. And on the return call, did she advise you?

A. She advised us that they would like 40,000.

Q. Did you have any other conversation with her between that time and the time of actually issuing and delivering [42] these policies concerning the issuance of this insurance?

A. I couldn't say for sure, but I don't believe I contacted her any further on that.

Q. You had two calls or two conversations with her? A. Yes, that's right.

Q. Have you testified as to all your conversation at that time respecting this insurance?

A. Yes, sir.

Q. Is there any further information respecting the issuance of these policies that, to your knowledge, you engaged in with Mrs. Zimmerman or with Morgan Stivers?

A. We did advise her that a caretaker was necessary on the premises.

Q. You say "we did." Did you? A. I did.

Q. Was that a part of one of these conversations? A. Yes, it was.

Q. Can you tell the court the words of the conversation to the best of your recollection, Mrs. Dines?

Mr. Castro: This is the same objection again, your Honor, with the further objection on behalf of all defendants that it is an attempt to modify and change the terms of a written contract which fol-

(Testimony of Florence Woods Dines.)

lowed this alleged conversation and the [43] policies.

The Court: The same ruling, counsel.

Mr. Castro: I am hesitant, your Honor, because oftentimes we sit back and don't—

The Court: I am not criticizing counsel, understand that, for making his objection, but, naturally, a case like this has to come in piecemeal and apparently this evidence is tying in a general agent, because the general agent wrote the policy, apparently, from this lady's testimony. She got the information and gave the information, passed it on to the general agent of the company, who prepared the policy, so I will make the same ruling. It is subject to a motion to strike.

I want to say that I know it is a close point when you can modify a policy by conduct of the parties. I recognize that. I had another case involving, not this question that we have here, the question of the vacancy of the premises, but other questions as to a policy of fire insurance, and I recognize it is necessary for me to get the facts, the whole facts, from which can be gleaned what the true picture is.

Mr. Castro: Yes. I agree with your Honor. Thank you.

The Court: This was a case involving an explosion, a fire, an explosion loss, whether there had been a waiver by a local agent of proof of loss. There were a few of the high points in that case that make me feel it is necessary [44] that I should get the whole picture before I attempt to try to

(Testimony of Florence Woods Dines.)

work out the answer. As a matter of fact, what I want to do in this case is to listen to the facts, and then I am going to have you gentlemen brief it. I notice you have got some books here, but I am not going to listen to any argument at this time, but I am going to make you brief it.

Mr. Stump: Your Honor, we would be very happy to put any information before the court that is necessary.

Q. Mrs. Dines, do you recall the question?

A. I believe it was my conversation with Mrs. Zimmerman, was it not?

Q. Yes. You were asked to tell the court to the best of your recollection what you said and what she said at that time.

A. I advised Mrs. Zimmerman in order to keep the insurance effective, we must have someone on the premises living there, and she said that they would have someone occupying the property at all times.

Q. That was prior to the issuance of these policies here?      A. That's right.

Q. And thereafter did you take any further action to get these policies issued?

A. No, sir, I did not. I turned that over to the office secretary that was assisting me. [45]

Q. What is her name?      A. Mrs. Heysler.

Mr. Stump: I have no further questions at this time.



(Testimony of Florence Woods Dines.)

Cross-Examination

By Mr. Castro:

Q. You have been with Mr. Stivers' office about how long? A. Since 1946.

Q. During all of that time have you served as an office manager? A. That's right.

Q. And how long have you been engaged in the insurance business?

A. I have worked in the insurance business since 1937.

Q. You are still employed by Truman B. Stivers? A. Yes, sir.

Q. Now, Mr. Truman B. Stivers, did he have any agency arrangement with the defendant Queen Insurance Company or the defendant Insurance Company of the State of Pennsylvania?

A. No. He does not have an agency with them.

Q. With reference to the Girard Insurance Company, did he have an agency appointment with it?

A. Yes, he does.

Q. And with reference to the National American Insurance [46] Company, did he have an agency appointment? A. Yes, he does.

Q. Did you have any policies in your office, blank forms of policies?

A. We have one copy of a blank form.

Q. What I am getting at is, did you have policies supplied to you in blank form by either the National American or the Girard Insurance Company? A. No, sir, we don't.

(Testimony of Florence Woods Dines.)

Q. Which would permit you to issue those policies without first getting the authority from the National American or the Girard?

A. No, we don't.

Q. So then Mr. Stivers or you or other employees in the office would then submit the proposal of insurance to either National American or the Girard, in this instance? A. That's right.

Q. They would either accept or reject that proposal of insurance? A. That's right.

Q. If they accepted it, the Girard or the National in turn would issue a policy and the necessary endorsements, which would be sent to your office?

A. Yes. But we do have the privilege of writing any endorsement that we want to on the policy. [47]

Q. In this instance, these policies which were issued on behalf of the defendant National and the defendant Girard, if you wish to examine them they are Exhibits 1 and 2 in the case, those two policies were written in the office of the Girard Insurance Company and the National American Insurance Company respectively? A. They were.

Q. And are those endorsements attached to each of those policies written in the office of National American and the Girard Insurance Company?

A. The endorsements were made at our office.

Q. What endorsements?

A. The signature, I mean, was made in our office.

Q. The policy and the endorsements were all

(Testimony of Florence Woods Dines.)

forwarded to you by the National American and Girard in those instances, were they not?

A. That's right.

Q. And then you were asked, Truman B. Stivers was asked to countersign the policies?

A. That's right.

Q. And the endorsements?

A. That's right.

Q. And to deliver them to Mr. Morgan S. Stivers?      A. That's right.

Q. So is that what was done in this [48] instance?      A. Yes, sir.

Q. Are you familiar with the Watchman's endorsement?

A. Yes, I know the Watchman's endorsement.

Q. You knew of it prior to the issuance of any of these policies to Morgan B. Stivers?

A. No. I have come in contact with that Watchman's endorsement since that time, in the last six months.

Q. You have been in the insurance business, you say, since 1937?      A. That's right.

Q. And have never heard of a Watchman's endorsement?      A. That's right.

Q. You have been assisting in the handling of the placing of policies, executing of policies?

A. That's right.

Q. Did you sign Truman B. Stivers' name to either one of these policies?      A. I did not.

Q. Who did?      A. Mrs. Heysler.

(Testimony of Florence Woods Dines.)

Q. After the policies were then signed by Mrs. Heysler, what was done with them?

A. They were sent to Morgan A. Stivers.

The Court: And the bill went along with it, didn't it?

The Witness: Yes, it did. [49]

Mr. Castro: I didn't get that.

The Witness: The bill accompanied the policy.

The Court: Because I have one on my desk now.

Q. (By Mr. Castro): The premium was paid, as I understand it. A. Yes, it was.

Q. How did you notify the National American concerning this insurance?

A. Mrs. Heysler did that, sir.

Q. You did not? A. No, I did not.

Q. How did you notify the Girard Insurance Company concerning this insurance?

A. Mrs. Heysler also did that.

Q. You did not participate in it?

A. No, I did not.

Mr. Castro: Is Mrs. Heysler going to be a witness, counsel?

Mr. Stump: Yes.

Mr. Castro: I believe those are all the questions I have, your Honor.

The Court: How is it it was not issued in one policy?

The Witness: On a large amount of insurance, even on large commercial buildings, insurance companies do not like to accept the full responsibility. They like to place it in [50] various companies so

(Testimony of Florence Woods Dines.)

that one company does not suffer the whole loss. When we wrote the policy on the new Masonic Temple in Long Beach, we had to have three companies on that building, too, even though it is a reinforced concrete building. One company wouldn't carry all the insurance.

Mr. Stump: I would like to ask several questions on redirect, if I may, your Honor.

The Court: All right.

### Redirect Examination

By Mr. Stump:

Q. Mrs. Dines, speaking now of your usual office procedure, you would call one of the insurance companies asking them for a policy, is that right?

Mr. Castro: I object to it as being immaterial, irrelevant. The question is what they did in this particular instance, your Honor.

Mr. Stump: We are offering this evidence now as part of the evidence which will support a conclusion that applications were orally made by Truman B. Stivers to the insurance company for policies, and no written applications were required from the applying assured himself, so that ostensibly there was authority there for a—there was an ostensible authority there in the agent Truman B. Stivers to write that policy as it was given to him verbally by the applicant.

Mr. Castro: You have been misled by somebody, counsel. [51] I want you to be well aware, however, that I have in my file a written application by Tru-

(Testimony of Florence Woods Dines.)

man B. Stivers to two of these insurance companies for which he was agent, namely, the National American——

The Court: What materiality has that, counsel, in this case? The policies were issued and it is a question of whether they complied with the terms of the policies, and at this time you are attempting to modify the terms of the written policies, aren't you?

Mr. Stump: We are trying to say that the insurance companies are estopped to assert an occupancy clause, that is what we are trying to prove, either that, or that the contracting parties dealt with the term occupancy in a special way. There is a special significance to that term between the parties here.

The Court: I may be speaking out of turn, counsel, but these policies were written and issued in the usual course of business, the way they conduct their business. To what extent Truman Stivers had any authority here, and whether he had any authority from anybody else, I don't see where this witness' testimony will add or detract from that point.

Mr. Stump: I see.

The Court: He carried out the issuance of these policies in the regular course of business. She hasn't testified that there was any information communicated to the [52] issuing agents, general agents, who were probably in Los Angeles. Were the general agents in Los Angeles?

the National American is in Los Angeles.

The Witness: The Girard was in Pasadena, but

(Testimony of Florence Woods Dines.)

The Court: She hasn't testified there was any information carried to them or conveyed to them to the effect that there was any policy with any different meaning than stated on their face.

Mr. Stump: We withdraw the question now. I have no further questions of her.

The Court: Am I not correct on that, counsel?

Mr. Stump: Yes, your are correct. Here again we have three parties participating in this, all in the same office, Mrs. Dines, Mrs. Heysler, and Truman B. Stivers, and their testimony put together makes the whole, but one of them separately does not tell the whole story.

The Court: I know, but as far as her testimony is concerned, she just carried on as usual, she didn't convey any information to the agents that there has to be an occupancy of any kind. Did you?

The Witness: No, only to the assured.

Mr. Stump: But we have Mrs. Heysler, who did talk to them.

The Court: That's all.

The Witness: Thank you, Judge. [53]

The Court: May this witness be excused?

Mr. Stump: Yes, your Honor.

Mr. Castro: Yes, your Honor.

(Witness excused.)

The Court: Call Mr. Stivers back now. If you have any short witnesses, let's get rid of them, these people sitting out there in a room by themselves twiddling their thumbs, because they don't like it.

Mr. Stump: The only short witness I know of would probably be Mrs. Heysler, and we will probably take more than 20 minutes on her direct.

The Court: All right. Proceed.

### MORGAN A. STIVERS

recalled as a witness herein, being previously duly sworn, was examined and testified further as follows:

#### Cross-Examination (Continued)

Mr. Castro: Counsel, as I understand it, will stipulate, your Honor, that at the time Mr. Morgan A. Stivers was examined under oath under the terms of each of these policies on December 29, 1954, before Notary Public S. S. Domurat, that he was asked the following questions and gave the following answers:

“Q. By Mr. Castro”——

The Court: You will have to speak a little louder, counsel, so the reporter can get this. [54]

Mr. Castro: Commencing page 31, line 22:

“Q. (By Mr. Castro): Did you ever discuss with Truman B. Stivers that you were not operating the packing shed? A. Yes; we notified him.

“Q. When did you do that?

“A. Well, it was back at the time we quit operating it.

“Q. That was in 1949 or 1950?

“A. Well, it was along about that time after we quit operating, after the years that the American Fruit Company used it.



(Testimony of Morgan A. Stivers.)

“Q. What did you tell him at that time?”

“A. We told him we weren't operating the plant that fall. The first season was navels, of course, in the fall, and we weren't operating.

“Q. How did you happen to have that conversation? Was there any particular reason?”

“A. Only that we heard or understood that you had to have a watchman on the property if you weren't operating, for the protection of the insurance.

“Q. Did Truman B. Stivers tell you that you had to have a watchman there? A. Yes.

“Q. Did he tell you that on more than one occasion?”

“A. Well, I don't know. We probably talked about it a [55] time or so before we had someone move in there to watch it.

“Q. Did you ever talk to anybody else from the insurance company other than Truman B. Stivers, that is, before this fire loss? A. No.”

Is it stipulated, counsel, that those questions and answers were asked and given?

Mr. Stump: So stipulated.

Q. (By Mr. Castro): Now, were you acquainted with Roy A. McMillan prior to the issuance of these policies? A. No, I was not.

Q. Did you have any contact with Roy A. McMillan?

A. No. All my contact was through Truman Stivers.

Q. Following this loss, you executed a proof of

(Testimony of Morgan A. Stivers.)

loss in writing for each of the companies involved here?      A. Yes.

Q. And who filled out those forms of proof of loss? Did you personally fill them out or have them filled out?

A. I had them filled out by Mrs. Zimmerman, our secretary and bookkeeper.

Q. Did you give her the information to insert in those proofs of loss?      A. Yes.

Q. On each of the proofs of loss under paragraph 2, entitled Occupancy, the building described or containing the [56] property described was occupied at the time of loss as follows: Building, packing house, not in use.

Did you give her the information, "Building, packing house, not in use"?      A. Yes.

Mr. Castro: Will it be stipulated, counsel, that that statement was made in proof of loss which was filed with each of the defendants herein and that the proofs of loss were sworn to on December 20, 1954, by Morgan A. Stivers before Notary Public Berenice D. Zimmerman, in and for Los Angeles County, California?

Mr. Stump: So stipulated as to all four policies.

Q. (By Mr. Castro): The notary public, Berenice D. Zimmerman, was also the lady that worked in your office, or was she another woman?

A. She works in the office.

Mr. Castro: I believe those are all the questions I have at this time, your Honor.

Mr. Stump: I have no further questions at this time.

The Court: That's all, then. You may step down.

(Witness excused.)

The Court: Call a short witness, if you can.

Mr. Stump: Mrs. Heysler. Well, I have changed my mind, your Honor. I think Mrs. Zimmerman will take only a few minutes. [57]

### BERENICE ZIMMERMAN

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Berenice Zimmerman.

The Clerk: Will you spell your first name?

The Witness: B-e-r-e-n-i-c-e.

The Clerk: Thank you. You may sit down.

### Direct Examination

By Mr. Stump:

Q. Mrs. Zimmerman, what is your occupation?

A. I am the office manager for Stivers Brothers.

Q. Are you also employed by Morgan A. Stivers as to his property? A. Yes.

Q. Do your duties involve the insurance on properties? A. Yes.

Q. Do you recall whether any insurance concerning the packing plant at Lindsay, California, was handled? A. I do.

(Testimony of Berenice Zimmerman.)

Q. Do you recall on or about some time in the fall of 1952, receiving a call from Truman B. Stivers or his office concerning that insurance?

A. On October 7, 1952, I received a telephone call [58] from Truman Stivers' office.

Q. Is it your policy, Mrs. Zimmerman, in the course of your duties, to keep a daily memorandum of your calls and the conversations? A. It is.

Q. Did you make such a memorandum on this occasion? A. I did.

Q. Do you have that memorandum with you?

A. I don't have with me now. I have it in your—

Q. Do you have any independent recollection of your telephone conversation at that time with Truman B. Stivers' office? A. Yes.

Q. You do recall it?

A. I do. I recall talking with their office?

Q. Yes. A. Yes, indeed.

Q. Will you tell the court what that conversation was?

Mr. Castro: May we find out who the other party to this conversation was?

Mr. Stump: I thought we had.

Q. With whom did you talk?

A. I talked with Mrs. Woods.

Q. Florence Woods Dines? A. Yes. [59]

Q. She was then Florence Woods?

A. Yes.

Q. Did she call you or did you call her?

A. She called me.

(Testimony of Berenice Zimmerman.)

Q. You recognized her voice on the phone?

A. Oh, yes. There was no mistake about who was calling.

Q. You talked to her quite frequently?

A. Yes, I did.

Q. Now, will you tell the court what the conversation was?

A. She told me with regard to placing the policies on the packing house, that in case of fire, since the plant was non-operating, that it would be necessary for us to put someone on the property, to live on the property, and for me to advise Mr. Morgan Stivers to that effect, and to let them know what he wanted to do about it, and also to let them know as to what distribution he wanted to make in the amounts of the policies.

Q. Was there anything further to that conversation at that time?

A. Yes. She also told me that because the plant was non-operating, that the rates on the insurance would be higher.

Q. Did you subsequently advise Morgan Stivers of that? [60]

A. When Mr. Stivers came in that evening—he was not in at the time the call came through to me—I gave him the memorandum. He always picks up the book when he comes in and takes his calls, and we discussed it, and later I advised her as to his decision as to what to do. He decided that a person would be——

(Testimony of Berenice Zimmerman.)

Q. You just tell us what you told Mrs. Woods.

A. Mrs. Woods?

Q. Yes, Mrs. Dines.

A. I told her what I am telling you, that I had talked to Mr. Stivers, and that the people would be put on the place, on the property, and that he wanted to place the insurance in the amount of \$40,000, total amount of \$40,000.

Q. And thereafter did you have any further conversation respecting this insurance at that time or until the policies were received?

A. I don't believe so.

Q. Did you in fact receive policies from Truman B. Stivers' office any time after that?

A. Yes, we did.

Q. Do you know what was done with those policies when they were received?

A. They were put in our files.

Q. Did you read them?

A. You mean word for word? [61]

Q. Yes. A. No, I did not.

Mr. Stump: I have no further questions.

The Court: May I ask, do you know whether or not there was an increased rate because this property was unoccupied?

The Witness: No. I don't believe the rate was actually increased, but I was advised that it would be increased, sir, because the property was non-operating at the time. I was advised by telephone, the talk with Mrs. Woods. That is shown on the record of the telephone call which I took.

(Testimony of Berenice Zimmerman.)

The Court: You say the rate was not increased?

The Witness: I don't believe it actually was, but I was advised that it would be.

The Court: All right.

Cross-Examination

By Mr. Castro:

Q. Isn't it a fact that what Mrs. Woods told you was that there would have to be a watchman on the property at all times?

A. Yes. She told me—that was the word she used, watchman at all times.

Q. Then did you tell that to Mr. Morgan A. Stivers, that there would have to be a watchman on the property at all times? [62]

A. Mr. Stivers read my note, sir, and we discussed it.

Q. Then did you call Mrs. Woods back and tell her Mr. Stivers would have a watchman at all times?

A. I called her back and told her he would meet whatever terms were necessary to be met in order for the insurance to be put in force.

Q. And did you have in mind at that time what she had told you, that there would have to be a watchman there at all times?

A. I beg your pardon?

Mr. Castro: Will you read the question?

(Question read.)

The Witness: I don't quite understand. Did I have in mind?

(Testimony of Berenice Zimmerman.)

Q. (By Mr. Castro): You stated that you—you testified that Mr. Stivers had told you that he would comply with all the terms of the policy.

A. Yes. That was his decision.

Q. Was that his decision after you told him there would have to be a watchman there at all times.

A. There would have to be someone on the property at all times.

Q. Did you use the term “watchman”?

A. To be very honest, I couldn't say. It has been three years since I had the conversation. [63]

Q. Did you write the words down?

A. I wrote the word “Watchman,” yes.

Q. I show you this memorandum book which you have. A. I am familiar with that.

Q. You have refreshed your memory from it and it uses the term “watchman,” does it not?

A. Yes.

Q. That term “watchman” is in your own handwriting? A. That is true.

Q. Then that is what you told Mr. Morgan A. Stivers, a watchman would be required, and so on?

A. Yes. It is in the notes.

Q. That is what you had in mind when you told Mrs. Woods, when you talked to her in the second telephone conversation, that Mr. Stivers would comply with all the terms of the policy?

Mr. Stump: I will object to that question, your Honor, on the ground I don't believe, I may be wrong, that she testified she told Mrs. Woods that



(Testimony of Berenice Zimmerman.)

Stivers would comply with all the terms of the policy. I believe that assumes a fact not in evidence.

Mr. Castro: I would like to have the reporter read it back.

The Court: She has testified that, that he would do whatever was necessary to comply with the terms of the policy, [64] to have insurance.

The Witness: The requirements were that there would be someone living on the property and we were advised that the rates would be higher—

Mr. Castro: I move to strike that as not responsive. That was not the question. Your Honor asked her if she hadn't made the statement.

The Court: I know, but everybody is not as experienced as we are. Let her tell her story. Everybody can't be an expert witness, you know, counsel.

Mr. Castro: I know that, your Honor. Sometimes we get on a broken record routine, you know.

Q. Mrs. Zimmerman, after you received the authorization from Mr. Morgan A. Stivers to proceed with the insurance with Truman B. Stivers' agency, you telephoned Mrs. Woods back? A. Yes.

Q. You have known her for a number of years, have you? A. Yes.

Q. About how long?

A. Possibly 10 years.

Q. How long have you worked with the Stivers Brothers concern?

A. Worked with Morgan Stivers Brothers concern?

(Testimony of Berenice Zimmerman.)

Q. Yes. [65]

A. In what way do you mean, worked?

Q. As I understand, you are employed at the present time, are you, by the Stivers Brothers?

A. Yes, Stivers Brothers.

Q. You were employed back in October, 1952, by the Stivers Brothers?      A. That is true.

Q. As I understand it, that is a partnership between Morgan A. Stivers and Howard Stivers and possibly some other members of the family?

A. Just Morgan and Howard.

Q. How long have you worked in regard to the Stivers Brothers?      A. Since April 15, 1945.

Mr. Castro: That's all the questions I have, your Honor.

The Court: That's all.

(Witness excused.)

The Court: We will take a recess until 2:00 o'clock. This witness may be excused?

Mr. Castro: Yes, your Honor.

Mr. Stump: Yes, your Honor.

The Court: We will take our recess now.

(Thereupon, a recess was taken to 2:00 o'clock, p.m.) [66]

Tuesday, February 21, 1956, 2:00 P.M.

The Court: You may proceed.

Mr. Stump: At this time, your Honor, we will call Clara M. Heysler.

CLARA M. HEYSLER

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Clara M. Heysler.

Direct Examination

By Mr. Stump:

Q. Mrs. Heysler, what is your occupation?

A. Well, I am a bookkeeper.

Q. And have you had occasion to be employed by Truman B. Stivers?      A. Yes.

Q. How long have you been employed by him?

A. Well, since 1949, part time.

Q. And were you so employed by him on or about—during the fall of 1952?      A. Yes.

Q. What are your duties there, Mrs. Heysler?

A. Well, I do any clerical duties. I take care of insurance and other clerical work that comes [67] up.

Q. And what do you do with particular reference to insurance?

A. Well, when policies come up for renewal I order the new policies and anything pertaining to it.

Q. Do you have any recollection of policies for Morgan A. Stivers on a packing plant in Lindsay, California, coming up for renewal during any period?      A. Yes, I do.

Q. Now, will you tell the court what you know about that?

(Testimony of Clara M. Heysler.)

A. Well, we pull our expiration files about 60 days prior to when a policy is about to expire and then proceed—we find out first if the insured wishes it to be renewed and then we proceed to call the companies and renew it if we can.

Q. With particular reference to the packing plant or house were you instructed by your employer or anyone in his employ to attempt to renew those policies?      A. Yes, I was.

Q. Who so instructed you?

A. Mr. Stivers.

Q. Truman B. Stivers?

A. Truman B. Stivers and his assistant, Mrs. Woods.

Q. Mrs. Woods Dines?      A. Yes.

Q. Now, what did you do in pursuance of those instructions? [68]

A. Well, they told me to call various companies and see if they would carry it and at what rates.

Q. And what companies did you call?

A. Well, the first company I called was the National American.

Q. And whom did you call there, if you know?

A. I think it was a man by the name of Mr. Weingarten. He was the rate clerk there and he was the one I usually talked to, but I couldn't be quite sure that he was the one I talked to.

Q. Now, when you called him were you calling to place an application for insurance?

A. No, only to get rates.

Q. And were you given rates?

(Testimony of Clara M. Heysler.)

A. Yes.

Q. Do you recall the conversation you had with Mr. Weingarten at that time?

A. Well, nothing specially except that I described the plant to him and how much coverage we wanted.

Q. When you described the plant what did you tell him?

A. I told him it was a packing house and the buildings that were on it, a loading platform and so forth.

Q. Was that all that you said about the subject premises to him? [69]

A. Well, now, that I can't recall. I told him everything he asked me but exactly what that was I can't say for sure.

Q. Did he ask you if it was occupied?

A. Well, that I don't recall.

Q. You don't recall that he did?

A. Not with that particular company. He may have later, you know, when I ordered it but we were only getting rates at that time.

Q. Now, did you call anyone just for the purpose of obtaining rates after you talked to Mr. Weingarten at National American? A. No.

Q. Then what did you do in reference to these policies?

A. Well then, I called a company which had been carrying it previously. Their policy was about to expire. I called them to find out how much they would take.

(Testimony of Clara M. Heysler.)

Q. What company was that? Was it in the Loyalty Group?      A. Girard, I think.

Q. And whom did you call at the Girard Insurance Company on that date?

A. Miss Ward I think was the name of the girl that took the orders.

Q. Do you recall the conversation you had with Miss Ward at that time? [70]

A. Well, not in detail I don't.

Q. Do you know what she asked you?

A. I gave her the number of the expiring policy and of course she would look that up—that would have the date on it.

Q. Well now, what next did you do in reference to these policies, Mrs. Heysler?

A. Well, these two companies said they—each one would only take \$10,000. We wanted \$40,000 and they would each take \$10,000, so we had to find a company that would take the rest of it.

Mr. Ray McMillan had two policies that were expiring so naturally we called him to see if his companies would renew.

Q. And whom did you talk to at McMillan's office?      A. Mr. McMillan.

Q. And did you talk to him before on the phone?

A. No, never.

Q. Then how do you know that you talked to Mr. McMillan?

A. Well, he said he was Mr. McMillan and I presumed he was telling me the truth.

(Testimony of Clara M. Heysler.)

Q. You had his telephone number out of the telephone book; is that it?

A. Well, out of the phone book. We may have had it on the slip that showed the policies were expiring. You see [71] this was one of the slips we pull.

Q. And you called that number? A. Yes.

Q. And the party who answered said he was Mr. McMillan?

A. Yes, he said he was Mr. McMillan.

Q. Now, do you recall what conversation you had with Mr. McMillan?

A. Well, I told him the policies were expiring and I gave him the numbers and if they—I told him about the companies and if they asked him would he renew and after some conversation he asked me various questions about them. He asked me if they were operating and I didn't know because I didn't know anything about the plant myself, so Mr. Neil Stivers was in the back office. He happened to be there and I knew he would know, so I told Mr. McMillan to wait on the phone and I would find out.

So, I went back and asked Mr. Neil Stivers if the plant was operating and he said no, and he followed me out to the front office where I was phoning from and stood there while I talked to Mr. McMillan.

I told Mr. McMillan that it wasn't operating at this time but then Mr. Stivers told me that they would—they were putting a man in there—that

(Testimony of Clara M. Heysler.)

there was living quarters right behind the plant and he was putting in a man so they could more or less keep his eye on it at all times. [72]

Q. Did you tell Mr. McMillan that?

A. I told Mr. McMillan that.

Q. Then what did he say to you, if anything?

A. Well, he said he would look into it and find out if the companies would renew and for how much and I think that was all the conversation we had at that time.

Q. Now, subsequent to that time did you call any or all of these companies about actually writing the coverage for this plant?

A. Yes. I called National American. I can't recall the dates or the exact conversation but he told me——

Q. That was prior to December 1, 1952?

A. Oh, yes. And he told me that they would renew in the sum of \$10,000 but that was all they were willing to take.

Q. Now, did you submit any written instrument to National American?

A. Well, I think we put in an order blank. It wasn't in detail. Just told him to renew on the packing plant.

Q. And when did you submit that?

A. Well, I couldn't give you the date.

Q. Was it before or after your second conversation by telephone with National American?

A. Well, it must have been after. I am not sure



(Testimony of Clara M. Heysler.)

of this. It must have been after because I told him to renew and he did and we got the policy. [73]

Q. Did you have your policies before you sent in this written statement?

A. No, I don't think so because I sent it as soon as he said he would take it. I just made out this little order and mailed it to him.

Q. Was that more or less a confirmation of the telephone call?

A. It was a confirmation. That is what you would call it.

Q. Now, did you talk to any other company besides National American?

A. Well, I called the Loyalty Group and told them.

Q. Well, before you say what you told them will you tell us with whom you talked at that time?

A. Now, I can't recall.

Q. You don't recall the name?

A. Well, I presume it was Miss Ward.

The Court: We don't care what you presume. If you don't know you don't know.

The Witness: Well, I don't know.

Q. (By Mr. Stump): Do you have any recollection of calling the usual number that you called in that regard? A. Yes.

Mr. Castro: That is leading and suggestive.

Mr. Stump: Well, I think she has shown her memory needs [74] refreshing, your Honor.

The Court: I will ask the question. Did you call the same number you called before?

(Testimony of Clara M. Heysler.)

The Witness: Yes, I did.

Q. (By Mr. Stump): And do you recall the conversation at that time, Mrs. Heysler?

A. Well, I don't recall it. I can give you the gist of it. I couldn't tell you the exact words.

Q. You don't remember the exact words?

A. No, I don't.

Q. Well, tell us to the best of your recollection what was said.

A. I told him it was the same packing plant they carried the insurance on and we were simply renewing it under the same conditions as far as I knew.

Q. This was with the Girard Company?

A. That was with Girard. We called it the Loyalty Group.

Q. You remember nothing further in that conversation?

A. No, I don't—not anything special. I may have called them several times but it has been quite a while ago and I don't remember.

Q. In any of these conversations with the office with whom you placed insurance, with Girard, did you discuss the plant's operations or [75] operating?

A. I did discuss it with Mr. McMillan.

Q. I am talking about——

A. The others I think I did but as I say it has been a long time and I can't recall the words I said, but if they asked me I told them.

Q. But you have no definite recollection?

(Testimony of Clara M. Heysler.)

A. No, I don't.

Q. Now, other than—strike that.

Now, coming again to Mr. McMillan and the policies with Queen and Pennsylvania State Insurance Company, was it necessary for you to call him after this conversation you have testified to, to request him to actually issue those policies?

A. Yes, I called him the second time.

Q. You called him the second time?

A. He called us back and said what he could get. You see we had the \$20,000 then and he said that he could get \$20,000 more so we told him to place it.

Q. And this second conversation, was that the extent of the conversation or was there a further discussion about it?

A. Well, I don't know. I don't know whether we discussed it further than that. Of course he had all the details at that time.

Q. You have no independent recollection of anything further in your conversation? [76]

A. No, I don't. The description of the plant was on his old policy. I didn't have to give him that. He had it all.

Q. And subsequent to that at any time did policies from Mr. McMillan's office come into your office? A. Yes, they did.

Q. And they were from what companies?

A. Well, the Queen and then a new company. He didn't renew one of them. He got a new policy from another company. I think it was the Institute of

(Testimony of Clara M. Heysler.)

Pennsylvania, or something, Insurance Company of Pennsylvania, I guess.

Q. And what happened to those policies if you know?

A. Well, they were processed and the bills rendered and the policies were mailed to Mr. Morgan Stivers.

Q. Do you know whether all four policies were mailed to Mr. Stivers in the same envelope and at the same time?

A. That I don't know. They may not have come in on the same dates. You see different companies may not have the same mailing dates.

Mr. Stump: I think we have no further questions. You remain there, Mrs. Heysler.

#### Cross-Examination

By Mr. Castro:

Q. Mrs. Heysler, you stated that about 60 days before the expiration dates of these policies in 1952, you called [77] the National American Insurance Company?

A. Well, I don't know the dates but it was during the month of October.

Q. 1952? A. Yes.

Q. And you called, you say, the National American to renew their policies?

A. They had no policy. I called them to find out what rate they would issue us one at and how much they would take.

Q. Then it is correct, is it not, that the National

(Testimony of Clara M. Heysler.)

American Insurance Company did not have an insurance policy on this risk prior to December of 1952?      A. That is correct.

Q. And anything you may have said to the contrary concerning a renewal policy by the National American Insurance Company was a mistake on your part?

A. That was not a renewal. We didn't call them for a renewal. We called them for rates in the beginning.

Q. And your use of the word "renewal" in your answers to Mr.—

A. Well, the renewals were the Loyalty Group and the Queen.

Q. Will you please let me finish my question?

A. Okay.

Q. The use of the word "renewal" so far as the National [78] American in answering Mr. Stump's question was an error because there was no renewal policy for the National American?

A. No, there wasn't.

Q. Now, your conversations with Mr. McMillan—you stated that he told you he could get you an additional \$20,000 worth of insurance?

A. Well, he didn't tell me in the beginning. He told me he would find out and then call us back and let us know if he could or not.

Q. Isn't it a fact Mr. McMillan did not obtain an additional \$20,000 in insurance for you at any time with regard to this risk?

A. I didn't understand your question.

(Testimony of Clara M. Heysler.)

Q. Well, isn't it a fact that the insurance that Mr. McMillan had gotten on this—do you have some notes?

A. Well, he placed \$12,500 with Queen and \$7,500 with the Insurance Company of Pennsylvania. That is \$20,000.

Q. How much did the Insurance Company of Pennsylvania have prior to December, 1952?

A. They had none—they had none.

Q. Isn't it a fact they had \$7,500 prior to December of 1952?

A. He was carrying it with another company.

Q. Isn't it a fact that the Insurance Company of Pennsylvania was a renewal policy? [79]

A. No, it was not.

Q. Now, with reference to the Queen Insurance Company, prior to December of 1952, didn't it have \$11,100 coverage?

A. Well, I don't remember exactly.

Q. You have some notes there. Do you have some notes? A. No, I don't have the notes.

Q. What did you take out of your purse and look at a few minutes ago?

A. This is what he agreed for the new, the policies in 1952. This had nothing to do with the old policies that were expiring.

Q. May I see what you have there?

A. Why, surely.

(Handing document to counsel.)

Mr. Stump: I have seen them, counsel.

(Testimony of Clara M. Heysler.)

Q. (By Mr. Castro): Referring to the documents that you have handed me, may I have these marked for identification, your Honor?

The Court: Yes.

The Clerk: Defendants' Exhibit A for identification.

(The exhibit referred to was marked Defendants' Exhibit A for identification.)

Q. (By Mr. Castro): The first sheet on Exhibit A is in handwriting, part pencil and part ink. Is that in your handwriting? [80] A. Yes.

Q. The second sheet is in handwriting, partly pencil and partly ink. Is that in your handwriting?

A. I think so.

Q. Is there some question about it?

A. Well, I think I wrote that.

Q. There is another sheet in handwriting. Is that in your handwriting?

A. Yes, that is my handwriting.

Q. And the next sheet in pencil handwriting. Is that in your handwriting?

A. Yes, that is my handwriting.

Q. And the note attached to that exhibit, is the handwriting there yours?

A. Yes, that is mine.

Q. Now, in October of 1952, didn't Mr. McMillan have two policies covering this risk?

A. Yes, he had two.

Q. And they were with the Queen Insurance

(Testimony of Clara M. Heysler.)

Company and with the Insurance Company of the State of Pennsylvania, were they not?

A. No, not the old one. It was Fulton, I think.

Q. Did you have a policy with the Travelers Insurance Company?      A. No. [81]

Q. Now, did you fill out a written application to anybody for fire insurance on these premises?

A. I think it is typewritten.

Q. And to whom did you fill it out?

A. Well, I think to the National American and Loyalty Group.

Q. Attached to Exhibit A is a carbon copy of an application for fire insurance.      A. Yes.

Q. Is that the one that you filled out?

A. Yes.

Q. And you filled out that application——

A. You see there it says “renewal of policy 102.” That would be the Loyalty Group.

Q. And that would be the Girard Insurance Company?      A. Girard, yes.

Mr. Castro: I would like to remove this document from the exhibit for identification, and mark it as defendants' exhibit first in order.

Mr. Stump: No objection.

The Clerk: Defendants' Exhibit B for identification.

Q. (By Mr. Castro): Now, did you file a written application with anybody else?

A. No, I don't think so.

Q. Didn't you file a written application with the [82] National American Insurance Company?



(Testimony of Clara M. Heysler.)

A. Yes, National American Insurance Company and the Loyalty Group.

Q. And do you have a copy of that application?

A. It is there, I think, attached to that—I am not sure.

Q. Is that the one on the letterhead of H. F. Ahmanson?

A. Yes, that is the National American.

Q. And you filled that one out?           A. Yes.

Mr. Castro: I would like to offer it in evidence as defendants' next in order.

Mr. Stump: No objection.

The Clerk: Defendants' Exhibit C in evidence.

(The exhibit referred to, marked Defendants' Exhibit C, was received in evidence.)

Q. (By Mr. Castro): Now, did you file any other written applications?

A. I don't recall any.

Q. In neither of those applications did you state that the premises were not in operation—were not occupied, did you?

The Court: The applications speak for themselves, counsel.

Q. (By Mr. Castro): Did you make any memorandum of any [83] conversation you had with Mr. McMillan?           A. Well, I may have made notes.

Q. Do you have any record of those notes?

A. Only what you have there. These were the notes I made while Mr. Neil Stivers gave me—when I had the first conversation, when he asked me—you

(Testimony of Clara M. Heysler.)

see, I put here “going to put Ahmanson in.” When he asked me if it was in operation I asked Mr. Neil Stivers and I had this with me and I wrote on here as he told me to—“going to put Ahmanson in,” and to go back—to give this to—this information to Mr. McMillan and that was done at the time of the conversation while I had him on the phone.

Q. Now, did you make that in regard to the Girard renewals?

A. No, no. This was when I was talking to Mr. McMillan. I had these slips all made out for the various companies ahead of time and I may have had the whole bunch in my hand while I talked to him, but that I was—you see, he gave me this information “open platform driveway between” and I wouldn’t have known that.

Q. **And** those are all the notes you made at the time you talked to Mr. McMillan?

A. Well, that is all I have with me. There may be other memoranda.

Q. Did Mr. McMillan have anything to do with the Girard [84] Insurance Company?

A. Nothing to do with Girard as far as I know.

Q. Now, did you write any letters to Mr. McMillan?

A. No, not that I recall.

Q. I understand there were some letters written—

Mr. Castro: Mr. McMillan is outside as a witness, your Honor. Could I have Mr. McMillan called in and ask him for those letters at this time?

(Testimony of Clara M. Heysler.)

The Court: Yes, you may get them.

Mr. Castro: At this time, your Honor, we will offer in evidence a letter dated October 7, 1952, on the letterhead of Truman B. Stivers, addressed to Roy A. McMillan "re Stivers Packing Company, Truman B. Stivers by F. E. Woods" as defendants' next in order.

The Clerk: Defendants' Exhibit D.

(The exhibit referred to marked Defendants' Exhibit D, was received in evidence.)

Mr. Castro: And a letter dated January 23, 1953, on the letterhead of Truman B. Stivers, addressed to the same person, Roy A. McMillan, bearing the signature "Truman B. Stivers by Florence E. Woods" as defendants' exhibit next in order.

The Clerk: E.

(The exhibit referred to, marked Defendants' Exhibit E, was received in evidence.)

Q. (By Mr. Castro): You say that at the time you talked [85] to Mr. McMillan in the telephone conversation that Mr. Stivers had told you, Mr. Neil Stivers had told you that the plant was not then in operation? A. Yes.

Q. Did he tell you anything about whether it would be permanently out of operation or whether or not that was temporary?

A. He didn't tell me. He just said it was not being operated.

Q. Did you tell Mr. McMillan that Mr. Stivers

(Testimony of Clara M. Heysler.)

would keep his eye on the property at all times?

A. No, I didn't tell him that. I said that they were putting a man in that company right back of the plant who would live there—there was living quarters back there.

Q. Didn't you use the phrase "keep his eye on it at all times"?

A. Well, I don't recall that particular remark.

Q. After this loss occurred did you give a written statement to anybody concerning this loss?

A. Well, I think I wrote up a statement as near as I could recollect of just what happened.

Q. And to whom did you give that written statement?      A. I gave it to Mr. Stivers.

Q. Truman B. Stivers?      A. Yes. [86]

Q. I will show you a copy of a statement dated February 22, 1955. Does it bear your signature?

A. Yes.

Q. And is that the statement which you wrote up?

A. It is a statement, yes. This is the statement I signed. I didn't type it up but I signed it.

Q. Did somebody dictate that for you?

A. No. I wrote it of my own volition.

Q. No one representing any of the defendants in this case asked you to make the statement?

A. He asked me to write up as near as I could remember just what happened and I did. That is as much as I can remember about it.

Q. And in that statement did you say—

(Testimony of Clara M. Heysler.)

The Court: Doesn't the statement speak for itself, counsel?

Mr. Castro: I will offer it in evidence as defendants' exhibit next in order.

The Clerk: Exhibit F.

(The exhibit referred to, marked Defendants' Exhibit F, was received in evidence.)

Q. (By Mr. Castro): The policies which were issued by the defendants in this case——

The Court: There is no dispute about the policies being issued. Why waste time on that? [87]

Mr. Castro: I wanted to be sure she was the one who signed Mr. Truman B. Stivers' name. The other lady said she thought this lady had done it and there is an initial under his name. Perhaps she can identify it. (Handing document to the witness.)

The Witness: Yes, I signed that. That is my handwriting.

Q. (By Mr. Castro): And what is your initial there?

A. "H." That is supposed to be an "H."

Q. The initial "H" under Truman B. Stivers' name, where it appears on these policies would represent your initials?

A. Yes, that I wrote it and put his name and put my initial on it.

Mr. Castro: I believe those are all the questions I have, your Honor.

Mr. Stump: We have no further questions of Mrs. Heysler.

(Testimony of Clara M. Heysler.)

We would like to call at this time Truman B. Stivers as a witness.

The Court: May this witness be excused?

Mr. Castro: Yes.

Mr. Stump: Yes.

(Witness excused.)

### TRUMAN B. STIVERS

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name. [88]

The Witness: Truman Bailey Stivers.

### Direct Examination

By Mr. Stump:

Q. Mr. Stivers, what is your occupation?

A. I am an insurance agent.

Q. And are you licensed in the State of California?

A. I am.

Q. How long have you been so licensed to transact insurance business?

A. Since 1948.

Q. And what companies do you represent?

A. Do you desire all of the companies I represent? I represent the Loyalty Group at the present time and in the Loyalty Group there is the Firemen's Insurance Company and the Commercial Casualty Company.

I did represent the Girard Insurance Company in the Loyalty Group, too, but at the present time I do not.

(Testimony of Truman B. Stivers.)

Q. Did you represent the Girard on or about December of 1949?      A. Yes, I did.

Q. And did you represent them on or about December of 1952?      A. Yes, I did.

Q. And did you have occasion to write through Girard Insurance Company policies of insurance on the packing plant [89] at Lindsay, California?

A. I did.

Q. Now, you represent the National American Insurance Company?      A. Yes.

Q. And at what times have you represented them?      A. At what times?

Q. Yes, when did you commence representing them and are you still representing them?

A. 1952 and I am still representing them.

Q. You were representing them on or about December 1st of 1952?      A. Yes.

Q. Now, as regards the National American Insurance Company did you receive any written authorization from them to represent them?

A. Yes. I received a letter from the company authorizing me to act as their agent without limitation.

Q. Mr. Stivers, I will show you a——

Mr. Castro: I will ask this be marked for identification first.

The Court: Go ahead and show it to him.

Q. (By Mr. Stump): I show you a letter dated December 13, 1951, signed by Davis S. Hannah on the letterhead of H. F. Ahmanson & Company, managers American Life Insurance Company. [90] Is that the letter you received?

(Testimony of Truman B. Stivers.)

A. Yes, that is the letter.

Q. That was your appointment as their agent, is that correct?      A. Yes.

Mr. Stump: At this time we offer this as plaintiff's next in order.

The Court: Received.

The Clerk: Plaintiff's Exhibit 5 in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 5, was received in evidence.)

Q. (By Mr. Stump): Now, as regards the Loyalty Group and particularly the Girard Company of the Loyalty Group, Mr. Stivers, did you receive a contract, an agency agreement from that organization?      A. Yes, I did.

Q. And I show you here what purports to be an agency agreement under date of September 16, 1948, between yourself as agent and the Girard Fire & Marine Insurance Company as principals. Is that the contract?      A. Yes, that is the contract.

Q. That you received?      A. Yes.

Mr. Stump: We offer this as Plaintiff's Exhibit 6 in evidence. [91]

(The exhibit referred to, marked Plaintiff's Exhibit 6, was received in evidence.)

Q. (By Mr. Stump): Now, at the time of issuing these policies on December 1st, 1952, covering the packing plant, were you operating under these instructions which have been shown you from the



(Testimony of Truman B. Stivers.)

National American and Girard Insurance Company?      A. I was.

Q. Now, Mr. Stivers, in the process of operating as an insurance agent did you countersign policies?

A. Oh, yes.

Q. And endorsements?      A. Yes.

Q. Did you have a supply of endorsements in your office?      A. Yes.

Q. Did you execute endorsements?

A. Yes.

Q. Without reference to the company?

A. That is correct.

Q. Before execution?      A. That is right.

Q. And did you maintain blank insurance forms or policy forms in your office?

A. No, I did not because it was more convenient to telephone the company and have them type the policies. [92]

Q. Was there some special arrangement between these companies and you in regard to that matter?

A. No special arrangement. It was just convenient to pick up the phone and call the companies and their office force would type the policy for us. It was just a matter of convenience.

Q. Do I understand you to state that your authority was then to prepare the policies yourself?

A. I beg your pardon?

Q. Do I understand you to state your authority was to prepare the policies yourself?

A. I believe I had that authority although I never actually prepared the policies.

(Testimony of Truman B. Stivers.)

Q. It was a matter of convenience that you did not prepare the policies? A. That is correct.

Q. Have you written other insurance for Morgan A. Stivers?

A. Oh, I have written a very large amount of insurance for Mr. Stivers—over \$4,000,000, I believe.

Q. Have you ever at any time been requested to issue insurance by Morgan Stivers and advised him at that time that he was insured from that moment on? A. Yes, many times.

Q. Now, as to the application for these particular [93] insurance policies Mr. Stivers, with Girard and National American, did you personally take the application for their issuance yourself?

A. Me personally, no.

Q. Who in your office did take the application?

A. Either Mrs. Heysler or Mrs. Dines.

Q. Do you recall the instance that either one of those persons discussed with you the expiration of the then existing policies and the issuing of new policies? A. Yes, they did.

Q. Do you recall which one spoke to you about it?

A. I believe Mrs. Dines brought it to my attention and then Mrs. Heysler contacted the insurance companies over the phone to obtain the rates and to see about the actual placing of the policy.

Q. Now, were you provided a rate back by these companies? A. Yes.

Q. And in writing insurance you applied the rate to the risk, is that correct?

(Testimony of Truman B. Stivers.)

A. That is correct.

Q. Did you instruct either Mrs. Heysler or Mrs. Dines to call the National American or Girard to ascertain rates?      A. Yes, I did.

Q. Was there any reason for that? [94]

A. Well, the National American is a deviating company and their rates are sometimes less than other companies and it is our policy to obtain the most reasonable rate for the best coverage for our client, so in the process of obtaining this insurance we naturally would call their company and we would find the rates and give the best insurance for the best rate possible.

Q. You testified, did you not, that you had a rate book for these companies?

A. That is correct.

Q. But you would, nonetheless call to obtain the rate?

A. Yes. We would look in our rate book but we would also always call the companies to ascertain that we were correct rather than have an embarrassing situation later when a mistake might be found.

Q. You called to verify the rate was correct?

A. That is right. The rates change quite often—every day. We have an envelope full of—maybe not every day but quite often. We have an envelope full of rate changes in our mail and it is quite a job to keep it properly filed so that there is absolutely no chance of mistake. So, we usually call the company to ascertain that our rates are correct before we actually quote them.

(Testimony of Truman B. Stivers.)

Q. Now, in your insurance dealings with Morgan Stivers did he submit written applications to you for these policies? [95]

A. No, no written application.

Q. Were you asked to obtain insurance on the packing plant prior to December 1st, 1952?

A. Yes.

Q. Had you obtained insurance?

A. We obtained insurance on the packing house in 1949, I believe.

Q. Was that the first time that you issued policies covering the packing plant?

A. Yes, that was the first time.

Q. At that time was a written application made to you by Morgan A. Stivers for insurance?

A. No, no. It was oral.

Q. Do you recall the circumstances of that application?

A. The exact circumstances I do not recall.

Q. Now, at no time then, your testimony is, did you receive a written application for insurance from Morgan A. Stivers either in 1949 or in 1952?

A. That is correct.

Q. Are you acquainted with the packing house located at Side Station?      A. Yes.

Q. When did you first learn of that—those particular premises, Mr. Stivers?

A. I believe they began to operate the packing house [96] when I was in the Army and on one of my leaves I visited the packing house back during the war years.

(Testimony of Truman B. Stivers.)

Q. That was prior to 1949?

A. Oh, yes. It was 1943 or 1944.

Q. Was the packing plant operating at that time? A. It was.

Q. What is the earliest time, to your knowledge if at all, did you know that of your own knowledge that the packing plant was not operating?

A. The packing house was actually not operating?

Q. Yes.

A. It was sometime after I wrote the first policy that I know of my own knowledge that it was not operating.

Q. How long a time?

A. I would say less than a year—within the year.

Q. What if anything—

The Court: You mean the policies of which these were renewals?

The Witness: Yes, the first policies.

Q. (By Mr. Stump): At the time that you were requested to renew these policies or to issue policies in 1952, did you know that the plant was not operating? A. Oh, yes, yes, I knew it was vacant.

Q. Of your own knowledge how long prior to that time did you know the plant had not been operating? [97]

A. Well, I knew that the plant had not been operating since approximately 1950.

Q. And had you had any occasion after writing the first policies and between that time and renewing the second policies to discuss with Morgan

(Testimony of Truman B. Stivers.)

Stivers or any representative of his, the fact that this plant was not occupied?

A. Yes. I am inclined to say quite often on business of my own. We have ranches there and I would make it a point to drive by the packing house to see that things were in order and on occasion I found that the people that were living in the plant, occupying it, had moved and I would bring this to the attention of Morgan Stivers and then he would see that somebody would be located in the property.

Q. And that was prior to issuing these second policies, is that right?      A. Yes, sir.

Q. And you knew for several years prior to issuing the second policies, the policies in 1952, that the plant had not been operated as such?

A. I knew it for more than a year, yes.

Q. And did you at any time have a conversation with Mr. Stivers regarding the necessity for having someone living on the premises in lieu of occupancy?      A. Yes, I did.

Q. Can you recall what you told Mr. Stivers at that [98] time?

A. The exact words, no, but the conversation was to the effect that unless he would keep somebody on the property his insurance would be in jeopardy—if it were vacant for a certain length of time he would be putting his insurance in jeopardy and he should try and keep somebody in there living on the premises.

Q. Did you at any time tell him his insurance

(Testimony of Truman B. Stivers.)

was in jeopardy because he was not operating the plant?

A. No. I thought that "occupancy" was people actually, physically living on the premises.

Q. Now, did you tell Mr. Stivers that at any time?

A. Well, I told him that if he would keep somebody living on the premises his insurance would be all right.

Q. And you told him that before these policies issued in December of 1952? A. Yes.

Q. And did you ever tell him that after that?

A. I believe so.

Q. And do you recall—strike that.

Now, did you have any conversations with Mr. McMillan at any time, the agent for Queen and State of Pennsylvania?

A. I possibly had a conversation with him back in 1949. It has been so long I really don't recall.

Q. Of your own knowledge do you know whether you asked [99] Mr. McMillan to issue or to write policies respecting the packing plant premises?

A. I did through Mr. Baker, special agent for the Loyalty Group in Pasadena. I asked Mr. Baker where we could place the rest of the insurance that Mr. Morgan Stivers desired on his packing house inasmuch as my companies were only willing to accept the maximum of \$20,000.

Q. Did you ever have any conversation with Mr. Baker respecting the issuance of these policies in relation to the operations of the packing plant?

(Testimony of Truman B. Stivers.)

A. No.

Q. Now, do you know what transpired in your office at the time of the renewal of the policies in 1952 in regard to conversations with Morgan Stivers? A. I know a little bit on it, yes.

Q. Will you tell the court what you know of your own knowledge?

Mr. Castro: Just a moment. I object to that as uncertain and nobody has testified previously concerning conversations out of that office who ever placed Truman B. Stivers present at any such conversation.

Mr. Stump: I will make the question more specific, more definite, your Honor.

I believe Mr. Stivers has testified that he talked to Mrs. Dines and Mrs. Heysler, but I will ask that question. [100]

Q. (By Mr. Stump): Did you have any conversation with either Mrs. Heysler or Mrs. Dines respecting the issuance of policies on the packing plant in 1952? A. Yes.

Q. What did you—with whom did you have a conversation? Did you have a conversation with Mrs. Dines? A. Yes.

Q. What did you—what was your conversation with her in that regard?

The Court: What materiality would that be, counsel? They have testified as to the conversations. You might ask the witness whether they were authorized to act for him or whether they were not.

The Witness: Yes, they were.



(Testimony of Truman B. Stivers.)

Mr. Stump: That was the only purpose I had in mind. My only purpose was to show that they were carrying out his orders to a certain extent.

The Court: There is no question about that is there, counsel?

Mr. Castro: I don't think so, your Honor.

Q. (By Mr. Stump): Did you at any time see the policies of insurance that were issued to Mr. Morgan Stivers when they were returned from Girard and National American?

A. I might have but it is the girls—the girls usually just take care of mailing the policies down to the [101] client.

They have authorization to countersign it and initial it and it is a matter of detail.

Q. (By Mr. Stump): You have no recollection of having personally seen those policies?

A. No.

The Court: You were familiar with the California form of policies, weren't you?

The Witness: Yes, sir.

The Court: You knew the terms and conditions of them?

The Witness: Yes.

The Court: And didn't you also know that you didn't have any authority to deviate from the form?

The Witness: I didn't think I was deviating from it.

Q. (By Mr. Stump): Mr. Stivers, did you keep the standard watchman form of endorsement—a supply of those in your office?

(Testimony of Truman B. Stivers.)

A. I don't believe we have any of those.

Q. Did you at any time prepare a standard form of watchman endorsement with these policies?

A. No.

Q. Did you know at the time—strike that.

Did you request Mrs. Heysler or Mrs. Dines to prepare a standard form of watchman endorsement for the policies? A. No, no. [102]

Q. You testified, did you not, that you did not think that such a form was necessary, is that correct?

A. Well, I was sure it wasn't—or my understanding was in order to have a watchman endorsement, in order to have the rate decreased on a policy, you have to actually have a watchman there—that is there at all times and punching a time clock and show evidence that he is there and making certain rounds and I knew that was impossible—that all that they were going to have there was somebody occupying the premises.

Mr. Stump: Your Honor, at this time a representative of the Farmers & Merchants Bank is here. If we could interrupt this witness for just a moment and put him on we could then release him. Is that agreeable?

Mr. Castro: Yes.

The Court: You may step down for a moment. You need not leave the courtroom.

Mr. Stump: May I suggest if we could have the 3:00 o'clock recess a little bit early we could go over this and perhaps counsel and I can stipulate as to it.

The Court: We will take a five-minute recess at this time. It is nearly time for the recess anyway.

(Short recess.) [103]

Mr. Stump: At this time I would like to call Mr. Herrold of the Farmers & Merchants Bank, Long Beach, California. Mr. Herrold, will you take the stand, please?

### CHARLES HERROLD

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Charles Herrold.

The Clerk: How do you spell your last name?

The Witness: H-e-r-r-o-l-d.

Mr. Stump: At this time, your Honor, the plaintiff offers to prove by Mr. Herrold that the writings on these policies signed by O. E. Wesenberg were in fact signed by him and that he is the vice president of Farmers & Merchants Bank, and a director of that bank. Mr. Wesenberg himself was subpoenaed to appear here, but he sent this messenger from the bank instead. If counsel doesn't feel this is adequate, we will then prepare to have Mr. Wesenberg here, but at this time, if this is sufficient, we will proceed on that.

### Direct Examination

By Mr. Stump:

Q. Mr. Herrold, what is your occupation?

A. Credit manager.

(Testimony of Charles Herrold.)

Q. Where are you employed? [104]

A. Farmers & Merchants Bank.

Q. In Long Beach, California? A. Right.

Q. Do you know O. E. Wesenberg of the Farmers & Merchants Bank? A. I do.

Q. What is his capacity in the bank?

A. Vice president.

Q. Are you familiar—

The Court: Just a minute. Does this witness know whether or not his people have any mortgage on the property involved here?

The Witness: I do not.

The Court: You don't know of your own knowledge?

The Witness: Not to my knowledge.

Q. (By Mr. Stump): Do you know Mr. Wesenberg's signature? A. I am sure I do.

Q. I show you here what purports to be a writing signed by Mr. O. E. Wesenberg. Is that Mr. Wesenberg's signature?

A. It appears to me that it is.

Q. And this is Plaintiff's Exhibit No. 2 that I have just shown you. I show you here Plaintiff's Exhibit No. 3, a writing purporting to be signed by O. E. Wesenberg. Is that [105] his signature?

A. It would appear to be, yes.

Q. I show you Plaintiff's Exhibit No. 4, a writing purporting to be the signature of O. E. Wesenberg. Is that his signature? A. It is.

Q. How about the fourth policy?

Mr. Stump: There is no lender's loss payable

(Testimony of Charles Herrold.)

clause on Plaintiff's Exhibit 1, your Honor. It only involves the three policies.

May I at this time, if the court permits, read for the record that on the mortgagee's clause form, No. 372, of Plaintiff's Exhibits 2, 3 and 4, there appears an identical writing, as follows: "Our loan on this property was paid in full on December 24, 1951. Therefore, we hereby release any and all interest in this policy, July 28, 1955, O. E. Wesenberg, vice president, Farmers & Merchants Bank of Long Beach," and the address of the bank.

I have no further questions of this witness.

The Court: Aren't you satisfied with that, counsel?

Mr. Castro: I am. It is the bank's privilege to release it and as long as they have a record to show the release, I certainly don't want to go into it any further.

The Court: Any cross-examination?

Mr. Castro: No cross-examination. [106]

The Court: That's all then.

(Witness excused.)

Mr. Stump: I think at this time Truman B. Stivers should be recalled.

The Court: Yes.

## TRUMAN B. STIVERS

recalled as a witness herein, being previously duly sworn, was examined and testified further as follows:

## Direct Examination

(Continued)

By Mr. Stump:

Q. Mr. Stivers, did you testify when you were last on the premises, the insured premises, before the fire?

A. Before the fire? I really don't know.

Q. Do you have any recollection of being there during the year 1954?

A. Yes, I was there during that time.

Q. Do you know what date the fire occurred?

A. Yes.

Q. What date?

A. October—well, I don't know. I happened to be in Lindsay on that day.

Q. Were you on the premises on the day of the fire?

A. On the day of the fire. We saw all the smoke from town and we drove out there to see what it was. We actually didn't get on the premises, but were on the highway next to [107] the property.

Q. Do you know of your own knowledge that persons were living on the premises at the time of the fire?      A. Yes, I do.

Mr. Stump: I think that's all we have at this time. Counsel may cross-examine.

The Court: May I ask, at any time during the

(Testimony of Truman B. Stivers.)

time that you knew that you were not operating as a packing house, whether you ever discussed it with any of the general agents of any of these companies or any of these special agents?

The Witness: No, I did not.

The Court: As far as you know, you never communicated that information to any of them?

The Witness: No. I was under the impression——

The Court: You were simply under the impression that the trailer there with the people living in it on the premises was sufficient?

The Witness: Yes, that's right.

The Court: All right. Cross-examine.

#### Cross-Examination

By Mr. Castro:

Q. At no time involved in any of the insurance coverages in this lawsuit have you been an agent or an employee or a representative of any kind of the Queen Insurance Company or the Insurance Company of the State of Pennsylvania? [108]

A. I have not.

Q. Or have either one of those companies authorized you to act for it in relation to the insurance involved in this lawsuit? A. They have not.

The Court: Do you have anything to do with the settlement of lawsuits for any of these companies?

The Witness: No. That is taken care of by their claims departments.

(Testimony of Truman B. Stivers.)

Q. (By Mr. Castro): You state that you had knowledge in 1950 that fruit was not being packed in this shed? A. During 1950, yes.

Q. When did you first conclude that it was during 1950 that you had this knowledge?

A. I beg your pardon?

Q. When did you first conclude that it was in 1950 that you had knowledge?

A. First conclude?

Q. Yes.

A. I really don't know what you mean. I know that at the time, shortly before the time that we actually wrote the first policy, the plant was in operation, and approximately within the next year, close to a year, I know that the plant was no longer in operation.

Q. After this loss that occurred, did you prepare a [109] written statement and forward it to Girard Insurance Company? A. I did.

Q. And in that written statement did you state, "I am in the Lindsay area on business of my own quite often throughout the year, and on a couple of occasions happened to drive by the packing house and discovered that people occupying it had evidently moved. Fruit was not being packed at the time. I don't remember what season of year this was." A. That is correct.

Q. Nowhere in this statement that you wrote under January 25, 1955, did you mention the year 1950, did you? A. I don't believe I did.

Q. Didn't you tell Mr. Morgan A. Stivers that



(Testimony of Truman B. Stivers.)

his insurance would be in jeopardy if the property was not attended to?

A. I told him that his insurance would be in jeopardy if nobody was living on the property.

Q. Didn't you tell him that if no one was attending the property, that his insurance would be in jeopardy? A. I don't know the exact words.

Q. Would you look at your statement of January 25, 1955? It is down in the lower portion of the page.

A. I used the word "attended" in this letter?

The Court: What was the language used there in the—— [110]

The Witness: In the statement?

The Court: Yes, read it.

The Witness: "After returning to Southern California I mentioned to Mr. Stivers and he arranged for people to occupy the premises. After this Mr. Stivers apparently stationed somebody on the premises most of the time. The reason for my calling to Mr. Morgan Stivers after I returned from Lindsay, when I discovered the property had nobody living there, was under my understanding of the insurance policy covering the property, if nobody was attending the property for a certain length of time, that the insurance would be in jeopardy, but the fact that he did obtain somebody to occupy the premises would comply with the requirements. The above sentence constitutes the effect of my conversation with Mr. Morgan Stivers."

That constitutes it in effect. I don't know the exact words used.

(Testimony of Truman B. Stivers.)

Q. (By Mr. Castro): With reference to the rate being used on this risk, did your office fix the rate?  
A. My office fixes no rates.

Q. What was the rate fixed by? The Pacific Rating Bureau?  
A. That is correct.

Q. Was there a special application filed with the Pacific Rating Bureau? [111]

A. Not by my office.

Q. Do you know whether any of the companies filed an application for that purpose?

A. I really don't know.

Q. Do you know whether this property was specifically rated by the Pacific Rating Bureau?

A. No, I don't.

Q. Now, so far as Roy A. McMillan is concerned, did you ask Mr. Russell Baker of the Girard Insurance Company to see whether he could procure the \$20,000 that you couldn't place?

A. I asked if he could find somebody that could place the insurance.

Q. Did you use the expression "broker it for you"?  
A. I don't recall the word.

Q. Do you understand the phrase "broker"?

A. I don't believe I do.

The Court: Don't you insurance agents with a larger policy generally place it through a broker and he in turn contacts different insurance companies to see how much they can take?

The Witness: A broker can represent any company.

(Testimony of Truman B. Stivers.)

The Court: He doesn't represent any particular company, but he can place the insurance.

The Witness: But he can place the insurance with all [112] companies, yes, sir.

Q. (By Mr. Castro): Did Mr. Morgan A. Stivers ever tell you that the plant was closed permanently, that it would not pack any more, either personally or for leasing out to any other party?

A. No.

Mr. Castro: I believe those are all the questions I have at this time, your Honor.

### Redirect Examination

By Mr. Stump:

Q. You knew, Mr. Stivers, that the plant had not been occupied for several years prior to December, 1952, didn't you?

A. There is that word "occupied" again.

Q. Well, operated.

A. It was not operated, but it was occupied.

Q. Did you know at the time that you instructed your clerks to renew the policies that the plant was not occupied?

A. It was not operated, but it was either occupied or would be occupied.

Q. And by occupied you mean——

A. By persons living on the property.

Q. Do you know of your own knowledge whether this plant was operated as an orange packing plant any time after December 1, 1952? [113]

(Testimony of Truman B. Stivers.)

A. No, I don't know.

Q. Do you know that it was not?

A. I am quite sure that it was not. I know that it was not.

Q. Were you there at any time after December 1, 1952, when it was?

A. When it was operating?

Q. Operated as an orange packing plant.

A. No.

Q. But you were there on the day of the fire?

A. I was.

Mr. Stump. I think I have nothing further to ask him, your Honor.

The Court: That's all. May the witness be excused?

Mr. Castro: Yes.

Mr. Stump: Yes.

The Court: You may be excused.

(Witness excused.)

The Court: I think you better call your short witnesses, counsel. Apparently you are not going to finish today, and tomorrow is a holiday.

Come forward. [114]

#### HOWARD STIVERS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Howard Stivers.

(Testimony of Howard Stivers.)

Direct Examination

By Mr. Stump:

Q. Mr. Stivers, are you related to Morgan A. Stivers?      A. Yes.

Q. What is that relationship?

A. Brother.

Q. Are you associated with him in business?

A. Yes.

Q. Is that in the form of a partnership?

A. Partners?

Q. Are you partners with your brother?

A. Yes.

Q. In what business are you a partner?

A. Building and contracting.

Q. Were you in partnership with him in the business of the packing plant?

A. At one time I had an interest, but in the last few years I hadn't had any interest in it.

Q. Do you recall when your interest in the [115] packing plant terminated?

A. Oh, I believe it was about 1950 somewhere, way back there.

Q. Since that time you have had no interest in the packing plant?      A. No.

Q. Was your name ever on a deed to the property?      A. No.

Q. What was the nature of that interest that you had, Mr. Stivers?

The Court: What do we care about that? We

(Testimony of Howard Stivers.)

want to know whether he had any interest at the time these policies were executed.

Q. (By Mr. Stump): Did you have any interest in this property on December 1, 1952?

A. No.

Q. Have you had any since? A. No.

Q. Have you been on the premises since December 1, 1952? A. Yes.

Q. What was the last time prior to October 13, 1954, you were on the premises?

A. It was just before, a month or two before.

Q. Were you there for some time or a short time or [116] what?

A. I was there for a few days, done some work.

Q. What kind of work were you doing?

A. Well, we were putting a roof on, putting some windows in, and some other cleaning up, things like that.

Q. At whose request were you there?

A. Through Morgan A. Stivers.

Q. Were you there on the day of the fire?

A. No.

Q. While you were there several months before doing this repair work, of your own knowledge did you observe anyone living on the premises?

A. Yes, there was a family living there.

Q. Where were they living on the premises?

A. They were living in a trailer.

Q. Was this trailer mounted on wheels or jacked up off the ground?

A. I just don't remember. It seemed like it was

(Testimony of Howard Stivers.)

jacked up, because they had the wheels covered up with gunny sacks, or something, from where I was standing. I just noticed that part.

Q. How long of your own knowledge was this packing plant not operated as such?

A. I believe the last time it was operated was in 1949. [117]

Q. Who operated it at that time?

A. American Fruit Growers.

Q. Was it operated, to your knowledge, did Morgan A. Stivers operate it as a packing plant after the Fruit Growers left?      A. No.

Mr. Stump: I think I have no further questions of this witness.

#### Cross-Examination

By Mr. Castro:

Q. Mr. Stivers, wasn't the last time the plant was operated as a fruit packing plant in the spring of 1951 or 1952?      A. It was in 1949.

Q. I show you a handwritten statement. Does it bear your signature?

A. Yes, that looks like my signature.

Q. Do you recall giving that statement?

A. Well, at that time I was not sure. He asked me and I told him I thought it was, and I called my brother and asked him, and he said, "I don't remember exactly when it was," and I hadn't been up there very much during those years, 1950, 1951, and I didn't know, and to my knowledge then it

(Testimony of Howard Stivers.)

was, but I found out from checking the records after I got home that it was different. [118]

Mr. Castro: I will offer in evidence this statement as defendants' exhibit next in order.

Mr. Stump: No objection.

The Clerk: Defendants' Exhibit G.

(The statement referred to was received in evidence and marked as Defendants' Exhibit G.)

The Court: Gentlemen, this case resolves itself down to more or less one question, doesn't it, and that is whether or not a trailer parked at the side of this building complies with the terms of the policy?

Mr. Castro: That is one way to phrase it, yes, your Honor.

The Court: Then what does this witness add to what has already been testified to?

Mr. Castro: Nothing.

Mr. Stump: The only thing this witness is called for is to establish he didn't have any interest in the proceeds of these policies. I think he has so testified.

Mr. Castro: Certainly.

The Court: Do you have any questions then?

Mr. Castro: No questions.

The Court: That's all then. Call another witness.

(Witness excused.)



Mr. Stump: Raymond K. Stivers would be called for the [119] same purpose, to prove he had no interest in the property. It is alleged by the defendant in his answer that Raymond K. Stivers has an interest in the property. There also is a paragraph in the complaint that pertains to Girard, that the policy should be reformed to delete Raymond K. Stivers' name from the policy, because his name was included thereon by mistake.

### RAYMOND STIVERS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Raymond Stivers.

The Court: Is that the purpose for which you are calling this witness?

Mr. Stump: Yes.

The Court: Then get right down to the point.

### Direct Examination

By Mr. Stump:

Q. Mr. Stivers, at any time, have you at any time owned an interest in a packing plant and loading platform at side station, Lindsay, Tulare County, California?      A. Yes.

Q. When did you acquire that interest and from whom? [120]      A. In 1943.

Q. From whom?

A. From—you mean the owners before we bought into it?

(Testimony of Raymond Stivers.)

Q. No. With whom did you share your interest?

A. With Morgan A. Stivers.

Q. Subsequent to that time did you dispose of that interest?           A. Yes.

Q. About when did you dispose of your interest?

A. About 1949 or 1950—about 1950, I believe it was.

The Court: Do you own any interest in this property, or did you at the time of the fire?

The Witness: No.

The Court: What more do you want?

Mr. Castro: I have no questions, your Honor.

The Court: That's all.

(Witness excused.)

Mr. Castro: With counsel's permission, I would ask the court to put a witness on out of order that has to get back, Mr. Edward Myers. [121]

### EDWARD L. MYERS

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Edward L. Myers.

The Clerk: Will you spell the last name?

The Witness: M-y-e-r-s.

### Direct Examination

By Mr. Castro:

Q. Where do you live, Mr. Myers?

A. Lindsay, Route 1, Box 772.

(Testimony of Edward L. Myers.)

Q. Are you familiar with the packing shed that was known as the Stivers Packing Shed?

A. Yes. I lived next to it there.

Q. About three miles north of Lindsay, California?

A. Yes.

Q. Prior to the name of Stivers Packing Shed, what name did it have?

A. Most people called it the Burr Packing Shed or the Stivers. Those are the only names I knew.

Q. In October, 1954, where were you living with relation to that packing shed?

A. Two or three miles east of it.

Q. Were you also employed at that [122] location?

A. Yes, sir.

Q. You were working for your uncle at the location?

A. Yes.

Q. Did you become acquainted with a man by the name of Morris who had a trailer at the Stivers Brothers premises?

A. Yes. Just by sight and talking to him a few times, neighborly, was all.

Q. On the day that the fire occurred at the packing shed, about what time of the day was it?

A. It was right around 12:00 o'clock.

Q. 12:00 noon?

A. Yes.

Q. Did you see the fire?

A. Yes.

Q. Did you immediately proceed to the packing shed?

A. Called my uncle and then we both went up there, yes.

(Testimony of Edward L. Myers.)

Q. Your uncle is whom, Mr. Myers?

A. Mr. Siegal.

Q. When you got to the packing shed, did you see Mr. Morris anywhere about the area?

A. No.

Q. Did you see his trailer there?           A. Yes.

Q. Did you do anything with relation to that trailer? [123]

A. We pulled it away from the fire.

Q. Later that day did you see Mr. Morris?

A. I seen his wife.

Q. Did you see his wife at the shed when you got there and pulled the trailer away?

A. No.

Q. Or did you see their son?           A. No.

Q. How much later that day was it that you saw Mrs. Morris?

A. It was around 4:30 or 5:00 o'clock, after their working hours, I guess.

Q. Did they have a job or did they follow some line of work, that is, Mr. and Mrs. Morris and their son?

A. They had been working in the olives, picking fruit, and stuff like that.

Q. What time did they go to work?

A. Oh, about 6:00 or 7:00 in the morning.

Q. In the morning?           A. Yes.

Q. About what time would they return?

A. Anywhere from 3:00 o'clock to 5:00 in the afternoon.

(Testimony of Edward L. Myers.)

Q. Did they purchase eggs from you from time to time?

A. Yes, they would stop. That is how I became acquainted [124] with them.

Q. About how long had the trailer been there at the premises at the time of the fire, just approximately?

A. Approximately a month and a half, or a month.

Mr. Castro: You may cross-examine.

### Cross-Examination

By Mr. Stump:

Q. Mr. Myers, were you ever on the packing plant property during that month and a half that Mr. and Mrs. Morris and son were there?

A. No, not that I recall.

Q. How do you know that they went to work at 6:00 o'clock in the morning?

A. They always went by and that is what they talked about, was picking olives.

Q. Is that what they told you?           A. Yes.

Q. Did you see them working?

A. No, I never did.

Q. At 6:00 o'clock in the morning, you were never on the packing house property while they were living there, except the day of the fire, is that right?           A. That's right.

Q. When did you arrive there on the day of the fire? [125]

(Testimony of Edward L. Myers.)

A. Oh, approximately five or ten minutes after 12:00. If the fire started at 12:00, I was there probably five or ten minutes after.

Q. Did you look for Mr. Morris?

A. No, I didn't.

Q. Were there other people there?

A. Yes. There was two men there.

Q. Did other people arrive after that?

A. Yes.

Q. Did you recognize Mrs. Morris on sight?

A. Yes.

Q. How many times had you seen her prior to that occasion?

A. Oh, probably two or three dozen times.

Q. And each time you saw her away from the premises at your place?

A. She would either go by in the car or something like that.

Q. You saw her going by in the car?

A. Yes, sir, or stop at our place.

Q. How old was this son?

A. I would say approximately 16 or 17.

Q. Did you know him by sight, too?

A. I never talked to him very much or anything. Maybe said hello, and that was about it. [126]

Q. But you had seen him? A. Yes.

Q. You would recognize him when you saw him?

A. Yes.

Q. Did you look for him on the day of the fire?

A. No.

(Testimony of Edward L. Myers.)

Q. Your testimony is you didn't see him on the premises on the day of the fire?

A. Well, after—I wouldn't say for sure if I seen him or not. I think he was with his folks there when they come home from work.

The Court: I don't care what you think. Do you know?

The Witness: No, I don't know, not for sure.

Q. (By Mr. Stump): How far did you live from these premises, Mr. Myers?

A. About two or three miles.

Q. In which direction? A. East.

Q. Is that flat country? A. Yes.

Mr. Stump: I have no further questions.

### Redirect Examination

By Mr. Castro:

Q. When the Morrisises went to work, did the road that they used go by your uncle's [127] property? A. Most of the time.

Q. And that is when you would see them, about 6:00 o'clock in the morning?

A. Yes, along there.

Mr. Castro: I have no further questions.

The Court: That's all then.

Mr. Stump: That's all.

The Court: Step down.

Mr. Castro: May this witness be excused?

The Court: He may be excused.

(Witness excused.)

Mr. Stump: Your Honor, we had the watchman, Mr. Morris, to come down today. He has not arrived. We have been searching for him most of the day. He may not have got here or he may have gotten lost.

The Court: Must have got on the freeway.

Mr. Stump: I was thinking perhaps, since he is our last witness, except Mr. McMillan, that perhaps we would inquire if counsel cares to proceed with some of his witnesses.

Mr. Castro: If that is all you have, I was going to put McMillan on as my own witness, take him either way, or I have two short witnesses to proceed with.

Mr. Stump: In view of the time, out of courtesy to them, if the short witnesses could go on, they would not be required to come back on [128] Thursday.

Mr. Castro: Then you will rest at this time except for the possible testimony of Mr. Morris?

Mr. Stump: That's right.

Mr. Castro: Mr. Baker.

### RUSSELL J. BAKER

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Russell J. Baker.



(Testimony of Russell J. Baker.)

Direct Examination

By Mr. Castro:

Q. Where do you live, Mr. Baker?

A. Pasadena.

Q. What is your occupation?

A. Manager of the Loyalty Group Insurance Company.

Q. In the Loyalty Group, is one of the companies known as Girard Insurance Company?

A. Yes, sir.

Q. In 1952, were you employed by the Loyalty Group?      A. Yes, sir.

Q. Were you acquainted with Truman B. Stivers at that time?      A. Yes, sir.

Q. Were you also acquainted with Roy A. McMillan? [129]      A. Yes, sir.

Q. Did Mr. Stivers make any request to you concerning the placing of any insurance on the packing shed premises just north of Lindsay, California?

A. It was not Mr. Stivers direct. It was Mrs. Woods in Mr. Stivers' office.

Q. What request did Mrs. Woods make to you?

A. Well, she asked us how much we could handle. We told her \$10,000. She said, "Well, we have possibly another twenty in addition to that."

So I got her in touch with Mr. McMillan for placing of additional insurance.

Q. Now, I show you an application form. Do you recognize that as the written application which came in for the placement of this coverage?

(Testimony of Russell J. Baker.)

A. Yes, sir.

Q. And following the receipt of that coverage, did your company then write the San Francisco office for the rate to be used? A. Yes, sir.

Q. And is that under a memorandum dated October 31, 1952? A. Yes, sir.

Q. And then did you have further correspondence concerning the rate to be used on that [130] property? A. Yes, sir.

Q. Is that attached in this memorandum dated February 5, 1953? A. Yes, sir.

Q. Was there a rate established on this property? A. Yes, sir.

Q. And who established the rate on this property? A. Pacific Fire Rating Bureau.

The Court: Who?

The Witness: Pacific Fire Rating Bureau.

Q. (By Mr. Castro): Did it issue a rate?

A. Yes, sir.

Q. Is that the rate shown under Correction Sheet No. 61, dated September 1, 1950?

A. Yes, sir. That was sent to us from our San Francisco office.

Q. In referring to Burr Siding three miles north of Lindsay? A. Yes, sir.

Q. That is the same property which was occupied by the Stivers Brothers?

A. Yes, sir.

Q. Was this property rated as occupied or unoccupied premises?

(Testimony of Russell J. Baker.)

A. Occupied premises right there on the rate sheet. [131]

The Court: Is there anything on there to show it was occupied?

The Witness: Your Honor, if it was not occupied, it would say vacant right behind the top line there where it says packing shed, you see, under Burr Warehouse. The formula for the rating bureau is if it is a vacant building, it shows vacant right opposite the risk.

Mr. Castro: I offer these documents that have just been referred to as defendants' exhibit next in order as a composite exhibit, your Honor.

The Court: They may be so admitted.

Mr. Stump: Is that offered in evidence, counsel?

Mr. Castro: Yes.

The Clerk: Defendants' Exhibit H.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit H.)

The Court: Are those rates set by the Pacific Fire Rating Bureau?

The Witness: Yes. Anything over four units of dwelling classification are rated by the rating bureau.

Q. (By Mr. Castro): At any time did Mrs. Woods tell you that the premises would be idle or not operated as a packing shed? A. No, sir.

Q. Would that have made any difference in issuing [132] coverage, the rate to be used on these particular premises?

(Testimony of Russell J. Baker.)

A. As far as coverage, we wouldn't have written as large a line as we did if it was vacant, and if it was the vacant, the rate would have gone up.

Q. Are you familiar with the Watchman's Warranty or Watchman's Endorsement?

A. Yes, sir.

Q. Is there a standard form of Watchman's Endorsement for this type of location?

A. There is a standard form of Watchman's Endorsement put out by the Rating Bureau.

Q. That is the Pacific Rating Bureau?

A. Yes, sir.

Q. What is the effect of that Watchman's Endorsement so far as rating is concerned?

A. It gives a credit in the over-all rate of about 25 cents per hundred dollars of insurance.

Q. When is the first time you received any knowledge that the property had not been occupied?

A. Last Friday.

Mr. Castro: You may cross-examine.

### Cross-Examination

By Mr. Stump:

Q. Mr. Baker, what did you say your capacity is? [133]

A. Manager of the Pasadena office for the Loyalty Group Services, the service office for that area.

Q. You are a special agent for the Loyalty Group Company? A. Yes.

(Testimony of Russell J. Baker.)

Q. Is Girard one of those companies?

A. Yes, sir.

Q. And Mr. McMillan is an agent for Girard—I mean for—

A. He is an agent for one of our companies, yes, sir.

Q. It is not Girard?

A. No, sir. Firemen's.

Q. Firemen's Insurance did not run any policies on this premises?      A. No, sir.

Q. The request for rating here was submitted on whose request, Mr. Stivers' office or Mr. McMillan's office?

A. When you get an order in like we got in, I will give you the sequence. We wrote or we requested the rating from San Francisco. When we got the information, we gave it to Mr. McMillan so he could write his policies in the companies he put them in.

Q. So you requested this information as to rating for the purpose of issuing a policy of Girard, is that correct? [134]      A. That is correct.

Q. When you testified on direct, you stated that if the premises had been insured as unoccupied, there would have been the word "Vacant" on there, is that correct?

A. Not on the policy itself, but on the rating sheet, that is what I testified.

Q. In other words, you are stating unoccupancy and vacancy are the same thing?

A. No. If a risk is not occupied, according to

(Testimony of Russell J. Baker.)

the Pacific Fire Rating Bureau, it shows Vacant opposite the classification of the risk.

Q. What would happen if the plant were operating but vacant?

A. I don't see how it could operate and be vacant.

Q. Isn't it a fact that vacancy relates to the absence of physical possession of the building?

The Court: How could they occupy it, counsel, and operate it, without somebody physically being present?

Mr. Stump: It would depend, your Honor, I think, on the use to which the thing is put. Permission in this policy is granted without any limitation whatever to put them out of occupancy. If these documents here that have been presented have Vacant on them, that is in error because the buildings were never vacant, unless he is testifying that——

The Court: According to the testimony here, the building [135] was not actually occupied. There were people living in a trailer beside it.

Mr. Stump: But, also, your Honor, I believe the buildings were never vacant. There were machinery belts, the storage boxes, by the admission of the pleadings. There was everything that it took to require the operation of the plant still in the building at the time of the fire. There was no time when these premises were ever vacant. It was merely that they were not being used to operate for the purpose of a fruit packing plant at the time.

(Testimony of Russell J. Baker.)

Now we have a witness on the stand stating that if the building had been unoccupied, in requesting a rate they would have entered the word Vacant there. I am trying to ascertain if in requesting a rating, if the word Vacant is used to mean the same as unoccupied.

The Witness: I would say as far as the Rating Bureau is concerned, it would be the same, yes.

Q. (By Mr. Stump): It would be the same rating for either unoccupied or vacant?

A. It would have Vacant behind the rating memorandum.

Q. You stated if the word Vacant had appeared there, that you would have written a policy, but for not so great a coverage.

A. I know the first underwriter in San Francisco would not have accepted that much of a line of \$10,000 for that particular coverage. Probably half of that at the most, [136] if we had known it was vacant.

Q. Did you request a similar rating on this property in 1949, Mr. Baker? A. Yes.

Q. Do you have the documents concerning that request here?

A. No, sir. We don't keep them that long.

Q. Have you had occasion to review or to look at those documents since this controversy has arisen? A. You mean the ones from 1949?

Q. From 1949.

A. We only keep the expirations for three to six months after they expire. As soon as a new

(Testimony of Russell J. Baker.)

policy went into force, the others were destroyed.

Q. You don't know whether there was any notation on that request, whether it was vacant or unoccupied?

A. I am reasonably sure there was not, but I couldn't swear to it. Excuse me, counsel?

Q. Yes.

A. I think you could get that information from the Pacific Fire Rating Bureau in San Francisco.

Q. Do they keep their records longer than the six months' period?      A. Yes, sir.

Q. They rate for any company? [137]

A. Yes. You see, they are maintained by all the companies and it is operated by the State, and any risk other than a dwelling of under four units is rated by them, and all companies that subscribe to the Bureau get that rate from the Bureau. It is a non-profit making bureau.

Q. In every case where fire insurance is written, is a request for rating forwarded to the Pacific Underwriters?

A. Oh, yes, or else it is written automatically. They have their men going around all the time rating risks. The reason we had to request this rate up in that area is it was not in this district. This district only goes as far as Bakersfield, and from there on to the Oregon border it is another district, and that is handled through the San Francisco Rating Division.

Q. At the time the rate is requested, does that mean before the rate is established someone from



(Testimony of Russell J. Baker.)

Pacific Underwriters goes to the property and looks at it?

A. Yes, sir. All those are done personally, yes, sir.

Q. So at the time these ratings, before the ratings come back to you, someone from Pacific Underwriters had gone to the packing house property in Lindsay and observed the property, is that right?

A. Yes. When that rating is published, the date they were there will show on that publication in your exhibit, and that is the last time they were there. At the [138] top of the page you will see the date that they were there.

Q. Is it true it was also visited——

Mr. Castro: He doesn't know that.

Mr. Stump: He doesn't have that knowledge. All right.

The Court: When they fixed the rate, if it was unoccupied, they would have known it.

The Witness: Not necessarily. You see, they don't go out and inspect again unless they hear of a change or somebody calls it to their attention.

The Court: Don't they go out and inspect the property when they fix the rate?

The Witness: Yes, but——what date is that rating at the top of the page?

Mr. Stump: It says September 1, 1950.

The Witness: That was more than likely the last time they were there. Say, for instance, your Honor, that instead of a packing house, it became a warehouse, and the owner of the property or the

(Testimony of Russell J. Baker.)

agent for the owner of the property or the company said here that it had been changed, it would probably be beneficial to the insured and we would request a rerating and they would send a man down from San Francisco on the rerating, but they don't go around unless they hear of some change.

The Court: In other words, this is a rate they fix in their own office? [139]

The Witness: After a survey of the property.

The Court: Originally it was fixed by a survey of the property, but it doesn't necessarily mean they have done it at the time these policies were written.

The Witness: No. That was some time prior to the issuance of the policies.

Q. (By Mr. Stump): Didn't you just testify at the time this request in 1952 was made for a rate to the Pacific Underwriters Bureau that someone from that Bureau visited the property?

A. No, sir; I did not. I said that we asked our San Francisco office to get a copy of the existing rate. You misunderstood me there. In other words, we wrote to San Francisco as per the letter asking for the published rate at the time the policy was going to be written. Do I make myself clear?

Q. I understand you now, yes, but I was under the impression while you were testifying that you were testifying to the application made in 1952.

A. No, sir.

The Court: That was the established rate?

The Witness: We didn't have the rates down

(Testimony of Russell J. Baker.)

here, so we had to write to our San Francisco office to get the published rate from the Bureau in San Francisco, which was a couple of years after the rate was published. [140]

Q. (By Mr. Stump): To your knowledge, was a rating made subsequent to that time, this 1950 rating? A. Was there a rate made after this?

Q. Yes.

A. As far as I know, that rate is still in force.

Q. I show you here Plaintiff's Exhibit No. 2, Girard Insurance Company policy, and call your attention to a red stamp on the side which says "Pasadena."

A. That was written in our office.

Q. You stamped that on there in your office?

A. Where do you see that? That is Pasadena Survey?

Q. It is stamped on the margin of the policy on the left-hand side near the top.

A. Yes. That policy is sent down to our office from San Francisco.

Q. What is the significance of that stamp, Pasadena Survey, on the margin?

A. That means that the policy was issued in the Pasadena office rather than Los Angeles, San Francisco, Sacramento or some other office.

Q. That explains the Pasadena part, but what is the survey?

A. Survey means that is the issuing office of the policy itself, you see.

Q. Isn't it rather, Mr. Baker, that survey means

(Testimony of Russell J. Baker.)

there [141] was a survey of the premises made at the time?

A. No, sir; it does not. That has nothing to do with it. Survey is a term used in the fire insurance business for the issuing office. That's all that means.

Q. May I ask for the record, Mr. Baker, where did you obtain this printed rating sheet?

A. From our San Francisco office.

Q. And when did you obtain it?

A. The date will be right there, if you will see that letter where we asked for it. They mailed it right back to us. Do you see the letter signed by my secretary asking for the rate? Then, of course, as soon as they could possibly get it from the San Francisco Rating Bureau, they mailed it back to me so we could issue the policy.

Q. What does this mean here, "We believe you have quoted us the dwelling rates for this location"?

A. You will have to bring it up to me, sir.

Q. (Handing document to witness.)

A. On the back here they have quoted some rates that were the dwelling house rates, and then we sent this back to them with this memorandum, and that is when they sent this.

Q. Was there anything, Mr. Baker, in your communication to the Pacific Underwriting Bureau that would lead them to believe that you asked for dwelling house rates?

A. In the first place, I did not communicate directly [142] with the Pacific Fire Rating. I

(Testimony of Russell J. Baker.)

communicated with our home office in San Francisco.

Q. They asked for the rates?

A. They asked for them.

Q. I guess I am unusually thick on this, because I am not experienced in insurance matters, but now I have that straight. Did you communicate to your San Francisco office anything which would lead them to inquire of the Pacific Underwriters as to dwelling house rates for a packing house?

A. I couldn't imagine. The girl who wrote the letter is my secretary and she probably gave the location and the underwriter in our San Francisco office probably gave us a dwelling house rate in Lindsay, and then we had to write again and explain this was a packing house and not a dwelling house, and then we received the rate sheet.

Q. In other words, when the initial request was made to your office, they were under the impression you were asking for dwelling house rates?

A. That could have been.

Q. They did not know the subject of the insurance was considered to be a packing house and loading platform?

A. That could have been possible, yes, sir.

Mr. Stump: I think I have no further questions of this witness.

Mr. Castro: I have no questions. [143]

The Court: Gentlemen, have you any further witnesses from out of town?

Mr. Castro: I have one witness, your Honor, on

this rate situation who would probably take five minutes.

The Court: Where is he from?

Mr. Castro: He is from Southern California. He is local, I should say, your Honor, as far as convenience is concerned.

The Court: It is our adjourning hour.

Mr. Castro: That is perfectly satisfactory to me. We have to come back Thursday. There is no question about that.

The Court: Then that's all. You may be excused.

(Witness excused.)

The Court: How long are you going to take on Thursday?

Mr. Castro: I would think it would take me not more than an hour to an hour and a half, your Honor.

Mr. Stump: I think we should be through by noon, your Honor, saving oral argument, or something of that sort.

The Court: I can read better than I can listen, counsel.

Mr. Stump: I think we should have all the testimony in by noon.

Mr. Castro: I would definitely say we would.

The Court: Then we will take a recess until 10:00 o'clock Thursday morning.

(An adjournement was taken to Thursday, February 23, 1956, at 10:00 o'clock a.m.) [144]

February 23, 1956—10:00 o'Clock A.M.

The Clerk: Case No. 18737-BH Civil, Morgan A. Stivers vs. National American Insurance Company, et al.

The Court: You may proceed, gentlemen.

Mr. Stump: At this time, your Honor, the plaintiffs would like to call their last witness, Mrs. Ruby Morris.

RUBY MORRIS

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Ruby Morris.

The Court: Relax and make yourself at home.

Direct Examination

By Mr. Stump:

Q. Mrs. Morris, will you answer these questions so I can hear you and so the court can hear you.

Are you familiar with the packing house property of Morgan A. Stivers in Lindsay, California?

A. Yes.

Q. Have you ever lived on that property at any time? A. Yes.

Q. Will you tell the court what dates you lived on the property, if you recall?

A. We moved there the 3rd day of July. [145]

Q. Of what year? A. '54, I think.

Q. How long were you there?

A. We were there until the 14th of October.

Q. While you were there did a fire occur?

(Testimony of Ruby Morris.)

A. It occurred the 13th of October.

Q. When you say "we were there," who was there with you?      A. My husband and my son.

Q. And how old is your son?

A. He is 17, now.

Q. What were your living accommodations there?

A. We had hot water in the bath. We had electricity. We had showers. The same as we would have if we were in a camp.

Q. And did you live in a trailer there?

A. Yes.

Q. Where was this trailer situated in relation to the packing house, the bunk house?

A. It was, I'll say, about 50 feet from the packing house and maybe 30 or 40 feet from the bunk house.

Q. And it was situated between the packing house and the bunk house?      A. Between them.

Q. Is that right? [146]      A. Yes.

Q. Now, the three of you living there, what was the frequency of your presence there?

A. There was one of us there all the time.

Q. And did you perform any duties in relation to the packing house?

A. No. We just kept the people from going in, or anybody being around.

Q. Did any occasion ever arise when someone tried to go in?

A. Well, they came and we would tell them that we had no permission to let them go in. And at one time they came and brought a note and they went



(Testimony of Ruby Morris.)

in anyway, with us telling them; and my husband went in and brought them out and told them that unless Mr. Stivers came with them they were not to go in, that we had no permission to let anybody in.

Mr. Stump: I think that is all, your Honor.

The Court: You lived completely in your trailer, did you not?

The Witness: Yes.

The Court: Did you have access to the packing house?

The Witness: No, we weren't to go—we didn't go in at all. We didn't go in at all.

The Court: Did you have the keys to go in?

The Witness: No, we had no keys. [147]

The Court: What arrangements did you have in placing the trailer there?

The Witness: Mr. Jim Stivers came and wanted us to move there and watch the packing house. And he pulled the trailer there himself.

The Court: Well now, you say you had hot water and so forth. That was with the trailer, was it not?

The Witness: He had hot water. He had the butane tanks himself. He fixed the hot water himself. And he fixed the showers and he fixed the lights.

The Court: They were all in the trailer?

The Witness: No, they weren't. The lights were in the trailer, but the hot water wasn't in the trailer.

The Court: Where was the hot water?

The Witness: In the shower.

(Testimony of Ruby Morris.)

The Court: Where was the shower?

The Witness: Well, it was out between the trailer and the packing house.

The Court: A separate room there for that purpose.

The Witness: Yes.

The Court: Were you paid anything to stay there?

The Witness: We got our rent for staying there.

The Court: Permission to stay on the land?

The Witness: Yes, and watch it. They paid the electricity. They paid for the water, for the pump, the big pump. And we [148] paid our lights.

The Court: You paid your own lights?

The Witness: We paid our own lights, and they paid the rest.

The Court: Now, did you and your husband work?

The Witness: Yes. Sometimes he worked for himself; and sometimes we both worked.

The Court: How about your son?

The Witness: Well, sometimes he worked and sometimes he didn't.

The Court: Did he go to school?

The Witness: No.

### Cross-Examination

By Mr. Castro:

Q. Where do you live, Mrs. Morris?

A. We live in Porterville on West Morton, 360, auto court—trailer court. It's Scott's, H. L. Scott's.

(Testimony of Ruby Morris.)

Q. What was the date of your son's birth?

A. September 16, 1938.

Q. And he was 16 at the time of this fire?

A. Yes.

Q. Were you on the premises on the day of the fire, at the time of the fire?

A. We left that morning. I say "we"; my husband and I went to work. [149]

Q. What time did you leave the premises?

A. We left about 5:00 that morning.

Q. What time did you return?

A. We returned about 4:00 o'clock.

Q. 4:00 in the afternoon?

A. Around close to 4:00.

Q. And by that time the fire had destroyed the packing house?      A. Yes.

Q. And your trailer had been removed from the area, had it?

A. They pulled the trailer across the road.

Q. And Mr. Stivers and Mr. Seigel had taken care of the trailer for you?

A. Yes. Well, I don't know what their name was. The egg man is what I call him—the egg man.

Q. What time did you usually leave to go to work?

A. We left early because we didn't—we usually left around 5:00 o'clock and came in around 2:00.

Q. And what time would your son leave when he went to work?

A. Well, he didn't—sometimes he didn't work

(Testimony of Ruby Morris.)

and sometimes he did. If he worked he went with us.

The Court: Did he work on that particular day?

The Witness: Yes, I believe he did. [150]

Q. (By Mr. Castro): Where was he working on that day? A. We were picking olives.

Q. Where?

A. Well, I can't tell you. It was on Indiana, but I can't tell you the other street, I mean the other road.

Q. About how far was it from the packing house? A. Well, it was at Porterville.

Q. At Porterville. Do you know the name of your employer there, or his employer?

A. We were working for Mel Messenger. We were working for Sunland.

Mr. Castro: Those are all the questions I have.

Mr. Stump: I have nothing further, your Honor.

May this witness be excused?

The Court: Yes.

(Witness excused.)

Mr. Stump: The plaintiff will at this time rest, your Honor.

Mr. Castro: We discussed with counsel the facts that I neglected to ask Mr. Ed Meyer about on Tuesday afternoon, your Honor; namely, one, where the fire was when he first observed it, and counsel is willing to stipulate that if Mr. Meyer were called to testify that he would testify that the

fire was first observed by him in the packing house building itself, the north section of it, and then spread [151] from there to the other properties which were destroyed at the time of the fire.

Mr. Stump: That is correct. We so stipulate.

Mr. Castro: And the other thing which I would like to present to the court, which can be done by stipulation, is a diagram which was prepared by Mr. Stivers and Raymond K. Stivers at the time of the examination under oath, just generally showing the locations of the buildings involved in the loss. And I ask that it be marked as defendant's exhibit next in order.

The Court: Any objection?

Mr. Stump: No objection.

The Court: It may be admitted in evidence.

The Clerk: Defendants' Exhibit I.

(The exhibit referred to was marked Defendants' Exhibit I and received in evidence.)

The Court: I was wondering whether you were through with your cross-examination of Mr. Stivers. I just wondered if you were finished with him.

Mr. Castro: I think I had, substantially, except for some of these matters which are being taken care of by stipulation.

Mr. Donald, would you take the stand, [152] please?

## GEORGE DONALD

called as a witness by the defendants, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: George Donald.

The Clerk: That is spelled D-o-n-a-l-d?

The Witness: Yes.

The Court: You have got kind of a weak voice, haven't you?

The Witness: I am sorry. I am a little hoarse.

## Direct Examination

By Mr. Castro:

Q. Where do you live, Mr. Donald?

A. I live at 5522 Green Meadow Street, Torrance, California.

Q. What is your occupation?

A. I am chief underwriter of the H. F. Ahmanson & Company.

Q. What is H. L. Ahmanson & Company's relationship with the National American Insurance Company?      A. We are general agents.

Q. Now, were you an underwriter with H. F. Ahmanson & Company in October 1952?

A. Yes, sir.

Q. What experience had you had in underwriting at that [153] time?

A. At that time I had been underwriting for six years.

Q. Prior to that had you had other experience in underwriting?      A. No, sir.

(Testimony of George Donald.)

Q. Now, have you brought with you the file of the H. F. Ahmanson & Company concerning the underwriting of this loss?

A. Yes, sir. I have our daily report.

Q. And did you receive a written application from Truman B. Stivers?

A. We attached to our file a typewritten application from the Truman B. Stivers Agency, yes, sir.

Q. And is it dated?

A. It is dated October 29, 1952.

Q. Do you have any receipt as to when it was received by your company?

A. Received on October 31, 1952.

Q. Now, after receipt of that application were any steps taken to determine the rate to be used on the risk?

A. Yes. On November 3rd we wrote to the Pacific Fire Rating Bureau, their San Francisco office, requesting rates in order to write this particular risk.

Q. Do you have a copy of that letter or request which was made to the Pacific Fire Rating Bureau?

A. Yes, sir; I have. [154]

Q. Did you receive a response from the Pacific Fire Rating Bureau?

A. On November 7th their rating department indicated that there was no published rate available for this property.

Q. And thereafter were any steps taken by the

(Testimony of George Donald.)

general agency of H. F. Ahmanson & Company to fix a rate?

A. Well, in order to write our policy we applied a tariff rate and then made application to the rating bureau again in San Francisco asking them to inspect the risk and publish a rate for us.

Q. Now, under what date did you make the application?

A. Our application was dated November 28, 1952.

Q. Was that a written application?

A. Yes, sir.

Q. What did that application reflect as to the question of the occupancy of the property?

A. Our application states—there is a provision on this application to designate type and occupancy of risk, and we have typed in our office, “packing house and loading platform, bunk house and storage building.”

Q. And did the Pacific Fire Rating Bureau then establish a rate on this risk?

A. Yes, they did.

Q. As of what day?

The Court: Counsel, hasn't that been admitted in evidence [155] already?

Mr. Castro: Not this one, your Honor. This is a subsequent application that was made. The earlier one was September 1, 1950, which was a rate fixed when the Burr people were occupying the property.

The Witness: The rating bureau issued their publication on May 22, 1953, and established the



(Testimony of George Donald.)

effective date of the rates as being December 1, 1952—in response to your question.

Q. (By Mr. Castro): And is that rate identified in any way by sheet number? A. Yes, sir.

Q. How is it identified?

A. It was published under Correction Sheet No. 113, Lindsay, California, rate book, page 49; and the rates are identified on lines 10, 11 and 12.

Q. And does the rate as published indicate what type of occupancy it was rated?

A. They rated it as follows: A D—as in David—Class citrus packing house; D—as in David—Class box storage shed; and D—as in David—Class bunk house.

Q. Now, what does “D” stand for?

A. “D” is merely a classification of structure.

Q. Now, does the published rate reflect as to whether or not it was in an unprotected fire area?

A. This particular rate sheet will not establish that. [156] But in the front of each rating book there is a guide as to what is protected and unprotected.

Q. And are you familiar with that guide as to this? A. Yes, sir.

Q. Would you state what it shows as to being protected or unprotected area?

A. This was classed as being unprotected area.

Mr. Castro: At this time, your Honor, I would offer in evidence, as a composite exhibit, the written application by Truman B. Stivers dated October 29, 1952; a copy of the letter of November 3, 1952,

(Testimony of George Donald.)

wherein Ahmanson applied to the Pacific Fire Rating Bureau; and a copy of the application which it made to the Pacific Fire Rating Bureau on November 28, 1951; and a copy of the published rate as established by the Pacific Fire Rating Bureau on May 22, 1953, effective December 1, 1952.

The Court: Where would that be material except as to the application, counsel?

Mr. Castro: The purpose of issuing it is to show that Ahmanson & Company was dealing with it on the basis of an occupied citrus packing house and so applying, and the rate that was established was based upon an occupancy—

The Court: Well, counsel, I have been trying to find out this morning what you mean by "occupancy," and I don't know what you mean by an occupied citrus packing plant.

Mr. Castro: Well, the cases have defined it, your Honor. [157]

The Court: Isn't it true that all the equipment was in the packing house ready for use?

Mr. Castro: Yes, your Honor.

The Court: And I think that the case is going to turn a great deal upon what is meant by occupancy under an insurance policy.

Mr. Castro: May I state at this time what the decisions have held it to be in the past? The terms "vacant" and "occupancy" are alternate terms, not synonymous. The term "vacant" refers to a building wherein the usual contents of that building, inanimate objects, have been removed and the build-

(Testimony of George Donald.)

ing is empty. The term "occupancy" refers to a building which has its normal contents but is not being put to the use for which the contents and the building were designed.

The Court: Well, I think that is one of the questions that you gentlemen are going to have to brief. I don't know whether there was any direct testimony, but I believe it has been admitted by all parties that the plant was not in use——

Mr. Castro: That is right.

The Court: ——but ready for use.

Mr. Castro: That is right.

The Court: Now, when the building is equipped and ready for use is it occupied or unoccupied?

Mr. Castro: The decisions hold that it is occupied. There are two Ninth Circuit cases, one on a packing house and [158] the other on a factory, and California cases which I am familiar with dealing with a dwelling house.

The Court: Of course, a dwelling house is a little different, in a different category.

Mr. Castro: No, your Honor.

The Court: A dwelling house means it is occupied by human beings. A packing house might not necessarily be.

Mr. Castro: No. But occupied by putting it to the use—it has to be a used building as distinguished from unused.

The Court: Well, I am not going to argue the point now. But I think that is the point you gentlemen are going to have to brief.

(Testimony of George Donald.)

Mr. Castro: We filed trial briefs, and in the trial briefs we did cover—at least, I cited the cases I referred to at this time.

The Court: Well, I say frankly that I enjoyed Washington's Birthday and I didn't do any work yesterday.

Mr. Castro: I understand that landed unexpectedly in your lap Tuesday morning and you didn't have an opportunity to look at the pleadings, perhaps, that came in to you. But that is the purpose, the thought with which we are proceeding.

I will now offer in evidence the documents which I have referred to.

The Court: I don't see where they are admissible, except the application. Where is the insured bound by intercommunications [159] between the rating bureau and general agents?

Mr. Castro: Well, it shows the general agent's reliance upon the written application in applying to the rating bureau.

The Court: I know. I think the application would be admissible. But I don't see where the communications with the rating bureau would have any bearing upon this. They wouldn't prove anything one way or the other.

Mr. Castro: I have made the offer, your Honor.

The Court: I will admit the application.

Mr. Castro: And then may I have the other documents marked for identification, your Honor?

The Court: Unless counsel for the plaintiff wants them all in.

(Testimony of George Donald.)

Mr. Stump: Your Honor, we are not going to interpose any objection to their admission; although, I concur with the court that the intercommunications between Ahmanson and the rating bureau——

The Court: Well, counsel either consent to their admission or——

Mr. Stump: I consent to their admission.

The Court: All right. They are all admitted in evidence.

The Clerk: Exhibit J.

(The exhibit referred to, marked Defendants' Exhibit J, was received in evidence.) [160]

The Court: May I ask a question so I won't have to examine the papers? Does the application state whether it was occupied or unoccupied?

Mr. Castro: It gives the occupancy, that bracket for occupancy, as "packing house and loading platform," and refers to "bunk house" on the bunk house section.

The Court: What was the bunk house used for?

Mr. Stump: The bunk house was used to house this family that was living there prior to the Morris, who just testified this morning, and before the packing house was closed it was used by the crews during the packing season for their convenience.

Q. (By Mr. Castro): Now, Mr. Donald, in placing the rate which was used by the Ahmanson Company, or National American, on the packing house

(Testimony of George Donald.)

frame building, was it based on an occupied building or an unoccupied building?

A. On an occupied building.

Q. And had you known there was an unoccupied building, what would have been done with regard to the application?      A. You mean——

Q. Whether it would have been accepted.

A. The application for insurance?

Q. Yes.

A. Well, it wouldn't have been nearly so acceptable in my opinion. [161]

Q. And why not?

Mr. Stump: I will object to the question as calling for a conclusion of the witness. I don't think he has been qualified to determine whether or not the packing house occupied or unoccupied is more acceptable. He is merely an underwriter here on this matter.

The Court: Well, counsel, I don't think we are interested in what the rate would have been, or if there had been any rate in the event of an occupancy. I think it is a question here of what we mean by "occupancy."

Mr. Castro: Then those are all the questions I have on direct examination.

#### Cross-Examination

By Mr. Stump:

Q. Mr. Donald, you testified that the two requests were made to the Pacific Rating Bureau, is that not right?      A. Yes, sir.

(Testimony of George Donald.)

Q. And the date of the second request was when?

A. I believe it was November the 3rd.

I am sorry. November 28, 1952.

Q. 1952? A. Yes, sir.

Mr. Stump: May we have Plaintiff's Exhibit 1?

(Whereupon the document was handed to counsel.)

Q. (By Mr. Stump): Mr. Donald, are you familiar with the [162] National American Insurance Company policies? A. Yes.

Q. I show you here a policy of the National American Insurance Company which says "dated issued"—is that the date it issued?

A. The date it was typed in our office.

Q. Then the rate was determined on that date, was it not?

A. That's right. We rated it. We applied a tariff rate as a manual rate.

Q. And this policy left your office with this rate on it, is that correct? A. That is correct.

Q. And that date is November 18, 1952, is that correct? A. That is correct.

Q. On this second request, do you know the exact date of that request? That is, what you asked the Pacific Fire Rating Bureau to do?

A. I do. I have a copy.

Q. Did you ask them to go out and inspect the premises? A. That's right.

Q. And did they go out and inspect the premises? A. They did.

(Testimony of George Donald.)

Q. Did they report back that the plant was not operating as a fruit packing plant? [163]

A. No, sir.

Q. However, the Pacific Fire Rating Bureau went at your request to inspect these premises, isn't that right?

A. I can't establish that definitely. The only tie-in I have is that under our "remarks" we asked them to please publish the rate effective December 1, 1952, in order to take care of the effective date of our policy; and the rate was published on that date to be effective December 1, 1952.

Q. What was the date of the publication?

A. The publication sheet we received was dated May 22, 1953.

Q. Then sometime between the date of your request and the date of publication on May 22, 1953, your representatives from Pacific Fire Bureau called and inspected these premises? Isn't that right?

Mr. Castro: If he knows. He wasn't present, I am sure. They are in San Francisco and he is in Los Angeles.

Q. (By Mr. Stump): That was their duty?

A. That is their normal——

The Court: He isn't testifying to a lot of matters that he doesn't know about, is he?

Q. (By Mr. Stump): You rely upon these ratings given you by the Pacific Fire Rating Bureau, do you not?      A. Yes, sir.

Q. Now, if they had called at these premises and



(Testimony of George Donald.)

found [164] them unoccupied what would have been their report back to you?

A. In the past it has been customary to give us a form letter stating what they found that's not in accordance with our application. In other words, they would have advised us that the property was unoccupied or vacant or nonexistent.

Q. In this case you received no form letter advising you that there was any difference in the property as inspected from the property as reported on your application? Isn't that right?

A. That is correct, sir.

Q. And isn't it a fact that your application merely identifies "packing house, loading platform, bunk house" as the physical description of the objects?

A. They asked us—it is always our intent to advise them of occupancy as a means of further identification. They have specified on their regular printed application a space to be filled in and it is captioned "type and occupancy of risk."

Q. I see. And these items are listed under that particular phrase?           A. Yes, sir.

Q. "Type and occupancy of risk"?

A. Yes, sir.

Q. If, Mr. Donald, you had received a notice from your agents, the Pacific Fire Rating Bureau, that the plant was [165] unoccupied, what would your company had done?

Mr. Castro: The court sustained an objection—

(Testimony of George Donald.)

The Court: You are asking for a conclusion again.

Mr. Stump: Yes, sir.

I think I have no further questions.

Mr. Castro: I have no further questions.

May the witness be excused, your Honor?

The Court: As far as the court is concerned.

Mr. Stump: Yes.

The Court: You may be excused.

(Witness excused.)

#### ROY A. McMILLAN

a witness called on behalf of the defendants, having been previously sworn, resumed the stand and testified further as follows:

The Clerk: You have been sworn, haven't you? State your name again for the record.

The Witness: Roy A. McMillan.

#### Direct Examination

By Mr. Castro:

Q. Where do you live, Mr. McMillan?

A. 1117 Mountain Road Drive, Altadena.

Q. What is your occupation?

A. Insurance agent.

Q. How long have you been an insurance agent? [166]

A. About 28 years.

Q. Now, with relation to the defendant Queen Insurance Company and the defendant Insurance Company of the State of Pennsylvania were you

(Testimony of Roy A. McMillan.)

insurance agent for either one of those companies?

A. Yes.

Q. For both? Were you an insurance agent for the defendant National American Insurance Company or Girard Insurance Company?

A. I am an agent for the National American but not the Girard.

Q. Now, where do you maintain your office?

A. 2394 North Lake Avenue, Altadena.

Q. Now, when did you first learn of the Stivers Bros. Packing House there at Lindsay, California?

A. Approximately the date the first policy was written in December '49; probably a little prior to that, which might have been in November.

Q. Who contacted you concerning coverage?

A. Mr. Baker of the Loyalty Group in Pasadena.

Q. Russell Baker?           A. Yes.

Q. And thereafter did you obtain coverage for the packing shed?           A. Yes. [167]

Q. With what companies did you obtain coverage?

A. Well, at that time I obtained coverage, as I recall, with four different companies. You have the slip there that has the various companies.

Q. Referring to Exhibit—

A. Travelers—

Q. —D, a letter from Truman B. Stivers. I took it out of your file here in court the other day?

A. Originally we wrote coverage in the Fulton Fire Insurance Company, the Insurance Company

(Testimony of Roy A. McMillan.)

of the State of Pennsylvania, the Queen Insurance Company of America and the Travelers Insurance Company. And they had coverage with the Girard Fire Insurance Company.

Q. Now, coming up to the renewal of the coverage, who contacted you concerning coverage for December 1st of 1952?           A. In December, '52?

Q. Yes.

A. Prior to that—well, it was—I can't recall at this time just who it was that I talked with. It was a lady in the office, and I don't believe it was Mrs. Woods. It was someone else, as I recall.

Q. Would you state that conversation, if you recall it?

A. It would be pretty hard to do at this time. As I recall, we were to renew several policies and—well, at that time we were to renew the policy in the State of Pennsylvania [168] and in the Queen, and those were the only ones to be renewed: The Travelers Insurance Company policy had been cancelled at the request of the Stivers. I have the date of the cancellation here. Do you want me to check that?

Q. Yes, if you have that date.

A. It was cancelled, short-rate, March 1, 1950.

Q. That policy had been in the amount of \$12,700?

A. Let me see. That policy had been in the amount of \$12,700, right.

Q. Now, what was the amount of the Queen policy issued in December, December 1, 1949?

(Testimony of Roy A. McMillan.)

A. In 1949?

Q. Yes.

A. I don't happen to have that with me, but I might have some information here that might indicate—

Q. Is it indicated on the letter of Mr. Stivers?

A. As I recall it was—oh, let me see. That was \$11,100. And it was increased to \$12,500.

Q. And the Insurance Company of the State of Pennsylvania?

A. The Insurance Company of the State of Pennsylvania was—let me see. I have that. That was \$7,620 in '49.

Q. And the Fulton Insurance Company was what?

A. The Fulton Insurance Company was \$5,080.

Q. Now, in the course of the telephone conversation [169] that you had with Stivers' office concerning the renewal of the Queen and the Insurance Company of the State of Pennsylvania policies, did the lady talking to you make any statement concerning the property being unoccupied?

A. I do not recall there was any statement made at the time. And we did not order it that way. So in all probability there was none.

Q. Now, subsequent to that conversation did you contact the Loyalty Group to renew the Insurance Company of Pennsylvania policy?

A. I didn't contact the Loyalty Group. I didn't have the coverage through the Loyalty Group.

(Testimony of Roy A. McMillan.)

Q. What did you do concerning placing the insurance with the Insurance Company of Pennsylvania?

A. Well, I advised the company that the policy was to be renewed, subject to a change in the amount.

Q. And what amount did you change it to?

A. In the Insurance Company of the State of Pennsylvania—let me see if I changed that. Yes. No. The Insurance Company of the State of Pennsylvania—let's see. '49. It was \$7,500 instead of \$7,620.

Q. And what did you state to the Insurance Company of Pennsylvania as to occupancy?

A. That according to my knowledge it is occupied; there were no changes in occupancy. [170]

Q. Now, with reference to the Queen Insurance Company, did you fill out a written application?

A. Yes, I did.

Q. And I show you a printed form of application for insurance. It has been inked in. Was that filled in by you?      A. Yes, I did this myself.

Mr. Stump: Your Honor, I am going to object to this question and this line of questioning. The communications between Mr. McMillan and his companies are irrelevant to this matter here. Mr. McMillan is the agent of those companies. He is the one that procured and endorsed and signed and delivered these policies. What he wrote to his people to get the policies issued is merely self-serving and

(Testimony of Roy A. McMillan.)

hearsay as far as the issue in this lawsuit is concerned.

The Court: Well, I don't see any materiality in these other policies.

Mr. Castro: This is the renewal policy which was effective at the time of the fire.

The Court: The objection is overruled. I want to hear the facts.

Mr. Castro: May we have the question read back, your Honor?

The Court: Yes.

(Record read.)

Q. (By Mr. Castro): Does it bear your signature? [171] A. Yes.

Mr. Castro: I offer this in evidence at this time as Defendants' Exhibit next in order.

The Court: Read it so we can follow you.

Mr. Castro: "Application for Insurance.

"Agency: Roy A. McMillan.

"Company: Queen.

"Amount: \$12,500.

"Rate: \$278.47"

rate in 1949.

"Commission: 15 per cent.

"Insured: Morgan A. Stivers, dba Stivers Packing Company.

"Term: Three years from 12-1-52 to 12-1-55.

"Item 1: \$5,000 on frame building, occupied as packing house and loading platform.

(Testimony of Roy A. McMillan.)

“Item 2: \$5,000 on equipment pertaining to packing house and loading platform.

“Item 3: \$2,000 on field boxes and supplies.

“Item 4: \$500 on ‘D’ Class storage building.

“Total: \$12,500.

“Rate: Three years at \$278.47.

“Situated as Side Station three miles north of Lindsay, Tulare County, California.

“Mortgagee clause, loss payable clause, Farmers [172] & Merchants Bank of Long Beach, Third and Pine Streets, Long Beach, California.

“Clauses to be attached: No average clause.

“Signature: Roy A. McMillan.”

The Court: Is there any necessity of offering it in evidence as long as you have read it?

Mr. Castro: Thank you, your Honor.

Q. (By Mr. Castro): Now, were the policies then made out by the Insurance Company of Pennsylvania and the Queen Insurance Company forwarded to you? A. That’s right.

Q. And then did you in turn countersign those policies and endorsements? A. I did.

Q. And were they as you ordered them?

A. Yes, they were as ordered.

Q. Then did you deliver them to Truman B. Stivers’ office for delivery to the insured?

A. I either delivered them or mailed them. I don’t now recall. I have delivered and mailed policies.



(Testimony of Roy A. McMillan.)

Q. At any time prior to this loss did you receive any objections as to the form of either of those policies—

A. No.

Q. —the Queen or Insurance Company of the State of Pennsylvania, from Truman B. Stivers' office or from the [173] insured, Morgan B. Stivers?

A. No. There was one change on the policy. There was a change in the coverage rates. That is the only thing. Extended coverage endorsement decreased from 47 cents to 25 cents after the policy was written; a return premium of \$27.50 allowed. That is the only change that I recall being made on it.

Q. And was that at the request of the insured, or Truman B. Stivers, or from the company?

A. That is the result of the rating bureau checking rate. There was a rate change in there and the rating bureau found that they were entitled to a return.

Q. Was that a general rate reduction?

A. That's right.

Q. I show you the policy of the Insurance Company of the State of Pennsylvania, Exhibit No. 3 and the endorsement attached to it.

“Owing to a change in rates effective December 1st, 1952, rates and premiums are hereby changed by return or additional premiums as shown in rate in premium sections above.

“All other items and conditions of the policy remain the same.”

(Testimony of Roy A. McMillan.)

And it shows the old rate on the extended coverage as 47 cents and the new rate of 25 cents. [174]

A. That's right.

The Court: What do you mean by "extended" rate?

The Witness: Extended coverage rate for wind, storm and various other perils besides fire are covered.

Mr. Castro: Riot, civil commotion and things of that kind.

I believe those are all the questions I have on direct examination.

#### Cross-Examination

By Mr. Stump:

Q. What was the date of this change in the rate of the extended coverage, the endorsement to the policy, Mr. McMillan?

The Court: Doesn't that show on the policy itself?

The Witness: It shows on the policy. The rate on here was effective as of the effective date of the policy, 12-1-52. And this came out 12-29-52. That was the date of our——

Q. (By Mr. Stump): That rate was not known to you at the time the original policy was issued, but it was changed by an extended coverage endorsement?

A. The Pacific Fire Rating Bureau checks those rates and if they are in error, either too high or too low, we are notified.

(Testimony of Roy A. McMillan.)

Q. You have been in the insurance business for 28 years did you say?

A. Yes, sir, more or less. [175]

Q. And in your business you prepare endorsements to policies, do you?

A. Sometimes we do, and sometimes the company prepares them.

Q. You have authority to?           A. Oh, yes.

Q. And you have authority to countersign conclusive contracts of insurance?           A. Yes.

Q. And this application that was submitted by you which was read into evidence was signed by you, was it not?

A. Yes, this happened to be. We don't always send written applications on renewals. Lots of times we just have a little form sent from the company and we just renew as is; or we renew with the changes. But in this particular case, as the amounts were different from the previous policy, we sent a new application.

Q. Is it what you usually term an application, or is an application usually signed by the applicant, the insured?

A. No. We usually make up the application ourselves. The signatures of the insured are not required on our policies.

Q. The insured makes his application to you, the agent of the company, always, is that right?

A. Usually.

Q. And you considered the phone call from Tru-

(Testimony of Roy A. McMillan.)

man Stivers' [176] office as an oral application of the insured to you?      A. That's right.

Q. In that connection Mr. Truman Stivers' office was a broker placing the insurance?

A. That's right. They were brokering through us.

Q. Now, is there any significance attached to the fact that the Fulton Insurance Company did not renew or continue its policy on this plant?

A. I don't recall what happened there at the time. I believe it was at the request of the Stivers just to renew \$20,000 instead of \$30,000 as we had before. I think it was \$30,000. But it was more. And they suggested that it be renewed in the other two companies. They didn't state what amounts. But we fixed the amounts.

I believe shortly after that the Fulton Insurance Company pulled out from this agency, and they are only writing Lloyd's business now. But I think at this time—no. They were still writing fire insurance.

Q. Now, you testified, I believe, that on March 1, 1950, a short-rate was cancelled. Is that right?

A. That was on the Travelers. That policy was cancelled after the policy was written. And I have the date. It was cancelled, short-rate, on March 1st. The policy went into effect December 1st. So three months after the policy was written, at the request of Stivers Packing Company, why, [177] the policy was cancelled.

Q. "Short-rate" means the full rate has not been earned, is that it?

(Testimony of Roy A. McMillan.)

A. No, no. It is a penalty cancellation which is charged to the assured when the cancellation is requested by them, as against a pro rata when the company cancels.

Q. At any time, Mr. McMillan, from the time of the issuance of the first policy until the fire were you ever notified by any of these companies that you write insurance for on the packing plant to cancel the Stivers policy?

A. No. I don't recall the companies asked to cancel.

Q. The companies never advised you that the insurance should be cancelled because the plant was not operating, or any other reason?      A. No.

Mr. Stump: I have no further questions.

The Court: That is all.

Mr. Castro: The witness may be excused, your Honor?

The Court: Yes. This witness may be excused.

(Witness excused.)

The Court: This will be a good time to take our morning recess of five minutes.

How many more witnesses do you have?

Mr. Castro: Two short ones, your Honor.

(Short recess.) [178]

The Court: You may proceed.

## DAVID A. HULL

called as a witness on behalf of the defendants, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: David A. Hull.

## Direct Examination

By Mr. Castro:

Q. Where do you live, Mr. Hull?

A. Santa Monica.

Q. What is your occupation?

A. I am special agent and underwriter for the Fire Marine Department, Seeley Company.

Q. And what is the Seeley Company's relation to the defendant in this case, the Insurance Company of the State of Pennsylvania?

A. The Seeley Company are general managers for the Insurance Company of the State of Pennsylvania.

Q. Now, did you bring with you a copy of your daily records concerning the renewal of the insurance on the Stivers Brothers Packing House at Lindsay, California?      A. I did.

Q. And did you receive any information from anyone that the packing house was not being occupied or operated as a citrus packing house? [179]

A. No.

Q. At the time you issued the policy?

A. No, I did not.

(Testimony of David A. Hull.)

Q. Was your first knowledge on that subject after the fire occurred in October, 1954?

A. That's right.

Mr. Castro: I believe those are all the questions I have.

The Court: Any cross-examination?

Mr. Stump: Just one moment, your Honor.

No cross-examination.

The Court: That is all.

(Witness excused.)

The Court: Call your next witness.

Mr. Castro: Mr. Hull may be excused then, your Honor?

The Court: Mr. Hull may be excused.

Mr. Castro: Thank you, Mr. Hull.

### R. F. OWEN

called as a witness on behalf of the defendants, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: R. F. Owen, O-w-e-n.

### Direct Examination

By Mr. Castro:

Q. Where do you live, Mr. Owen?

A. Beverly Hills. [180]

Q. What is your occupation?

A. Assistant regional manager, Royal Liverpool Group.

(Testimony of R. F. Owen.)

Q. And how long have you been in the insurance business?      A. 34 years.

Q. Now, have you brought with you the underwriting file in regard to the Queen Insurance policy involved in this litigation?      A. Yes.

Q. Did you receive a written application for the issuance of the policy which is involved in this fire?

A. Yes.

Q. From whom was the written application received?      A. Roy McMillan.

Mr. Castro: And for the purpose of the record, counsel, can we stipulate that is the application that has been read into evidence?

Mr. Stump: If you tell me it is, so stipulated.

Mr. Castro: Yes.

Q. (By Mr. Castro): Now, on what date was that received by the Royal Liverpool Group?

A. October 30th.

The Court: What year?

The Witness: 1952.

Q. (By Mr. Castro): Now, where was the policy issued? [181]

A. In our Los Angeles office.

Q. And was it then delivered to Mr. McMillan for his countersignature and delivery to the insured?      A. Yes.

Q. Now, after the policy was issued was there any rate change concerning extended coverage endorsement?      A. Yes.

The Court: Why are we interested in this?



(Testimony of R. F. Owen.)

Mr. Castro: Counsel raised it and I thought I would cover it. It is not material on the fire rate.

The Court: I don't know, but I understand that whenever they rerate a place if it's less rate, why, the agent has to make the refund and loses his commission on that portion.

Mr. Castro: That is correct, your Honor.

Those are all the questions I have of Mr. Owen.

The Court: Do you have any information whether this plant was being operated or not?

The Witness: No, sir.

Q. (By Mr. Castro): Did anybody indicate to you, to your Royal Liverpool Group, that the plant was not being operated as a citrus packing company? A. No, sir.

Q. Did you have any other information other than shown in the application of Roy H. McMillan?

A. No, sir. [182]

Mr. Castro: Those are all the questions I have.

#### Cross-Examination

By Mr. Stump:

Q. When you received the application, Mr. Owen, did you request that the Pacific Fire Rating Bureau make a rating on the building?

A. Our procedure in this is that the location of this risk is outside of our jurisdiction in Southern California, so we corresponded with our San Francisco office for the rate on this risk.

Q. And did you ask someone out of your office to make the rating? Is that correct?

(Testimony of R. F. Owen.)

A. The rate was furnished to us by our San Francisco office.

Q. And do you know where that rate was obtained? Or was it made by your San Francisco office?

A. I can just imagine it was obtained from the rating bureau.

The Court: You are a member of the rating bureau?

The Witness: Yes.

The Court: All your rates are fixed by them, are they not?

The Witness: Yes, sir.

Q. (By Mr. Stump): Do you know of your own knowledge whether such rates are based upon a personal inspection of [183] the premises?

The Court: How would he know in this particular case, counsel?

Mr. Stump: He wouldn't, your Honor, because he hasn't even testified that they rated it. He surmised that they rated it.

The Court: Now, how would he know whether a rating bureau would send a man down there to rate this plant?

Mr. Stump: He wouldn't know of his own knowledge, except as his being an expert in this field and an underwriter, he would know what was usually done. We would presume in this case it was done. I think it has been earlier testified that inspections were made by Mr. Baker. And, therefore,

I will not pursue the question because the man does not know.

That is all. I have no further questions.

Mr. Castro: May Mr. Owen be excused?

The Court: As far as the court is concerned.

Mr. Stump: Yes.

The Court: You may be excused.

(Witness excused.)

Mr. Castro: The defendants rest at this time, your Honor.

Mr. Stump: No rebuttal, your Honor.

The Court: Gentlemen, you have a lot of Doe defendants here. Do you move to dismiss them at this time? [184]

Mr. Stump: We move to dismiss the Doe defendants, your Honor.

The Court: Granted.

Well, gentlemen, I think we ought to try to see if we can't agree on what the facts are. I might state what appear to me to be the facts. And I might also state, in the first instance, that I haven't studied the policies. But to my understanding, for more than 10 months prior to the fire the plant had not been in operation as a packing plant. And, also, that there was a trailer occupied by a family living within 50 feet of the plant; that their obligation was to see that nobody entered the plant without the written permission of the plaintiff in this case. The occupants of the trailer occupied it for free rent but received no compensation for that service.

Now, I don't believe anybody specifically has tes-

tified to the fact, but I think that the inference can be drawn that it is true, that the agent who wrote the policy or took the order for the policy knew that the plant was not in operation.

Now, isn't that the sum and substance of the facts of the case, gentlemen?

Mr. Castro: Yes, your Honor.

Mr. Stump: That is correct, your Honor.

The Court: The legal question then comes up whether or not the agent who wrote the policies can bind the company. [185] And I want to say that my understanding is that he cannot. I had one case in which the court upheld me in holding that the company was estopped by the reason of the conduct of the agent as far as the fire losses are concerned. I have never run across a case yet, or had a case yet, or had a case where the company has been held liable or estopped by information that the agent who writes the policies has.

It seems to me that there are two questions in this case: first, whether or not the information of the agent who wrote the policies in this case acts as an estoppel insofar as the companies are concerned; and secondly, whether the occupancy of the premises by a trailer and a man and wife and son were such as to constitute an occupancy within the terms of the policy.

Aren't those the only two questions, gentlemen?

Mr. Castro: Yes, your Honor, as I see them.

Mr. Stump: Those are the two problems involved, whether or not there was a special signifi-

cance given to the term "occupancy" by the contracting parties here.

Mr. Castro: Counsel in his pleadings has described it as a waiver and not as an estoppel. Sometimes the court distinguishes between those two terms. Does your Honor use the term estoppel as phrased in the——

The Court: Well, as I told you before, I have not had an opportunity to study the pleadings, and I don't know [186] whether—it might be considered a waiver or estoppel, either way.

But we have a situation where the agent who wrote the policies, delivered them, which were in effect a contract with this particular provision in it.

Mr. Castro: The issues as you have stated them, your Honor, are the issues, I think as we defined them in our trial briefs.

Mr. Stump: That is correct.

Mr. Castro: We came down to that when we got through admitting back and forth, the whole question of occupancy and whether there had been a waiver as far as Truman B. Stivers was concerned.

The Court: Well, in a memorandum you filed you submitted authorities to the effect that the non-operation of the plant would be the same as "unoccupied."

Mr. Castro: Yes, your Honor.

The Court: Now, I think that's the main question in this case because there is no question that the plant was there ready for use. In fact, the evidence shows that there had been some work done

in the plant in preparation of a possible resumption of operations.

Mr. Castro: I would be happy to brief it as defined by your Honor here.

The Court: Gentlemen, isn't that really the question [187] that I have to pass upon? Isn't it really a question of law?

Mr. Stump: It is really a question of law, your Honor. I think that everyone, the court and counsel here, are in agreement that you have properly stated the issues. As far as I know there is nothing further to do except to present to your Honor the correct law on the subject.

The Court: I will allow each of you 10 days to file any memorandum and five days each to respond to the other's memorandum. The memorandum will be simultaneous.

The Clerk: Five days to reply?

The Court: Five days to reply.

Mr. Stump: May I inquire? Should we submit our memorandum to you, sir, in two copies or one?

The Court: What is the practice, Mr. Clerk?

The Clerk: All pleadings and briefs are in duplicate, according to the rules.

The Court: In duplicate.

Mr. Stump: Thank you.

The Court: If you file them directly with me I will get them quicker, and you will get a decision quicker, perhaps.

(Whereupon, the above-entitled matter was concluded.) [188]

Certificate

I, J. D. Ambrose, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 17th day of April, 1956.

/s/ J. D. AMBROSE,  
Official Reporter.

/s/ DON P. CRAM,  
Official Reporter.

[Endorsed]: Filed July 26, 1956.

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 108, inclusive, contain the original

Petition;

Answer of Girard Insurance Co. of Philadelphia, Pennsylvania;

Answer of Queen Insurance Company of America;

Answer of Insurance Company of the State of Pennsylvania;

Answer of National American Insurance Company;

Stipulation to Amendment of Plf's Complaint and Defendants' Answer;

Plaintiff's Trial Memoranda in Compliance with Rule 12;

Defendants' Reply Trial Memoranda;

Memorandum of Opinion;

Findings of Fact & Conclusions of Law;

Judgment;

Notice of Appeal;

Designation of Contents of Record on Appeal;

Amendment to Designation of Contents of Record on Appeal;

Application for Extension of Time to Docket Record on Appeal, Affidavit and Order;

Stipulation for Release of Original Reporter's Transcript for Filing;

Bond for Costs on Appeal;

which, together with 1 volume of reporter's transcript of proceedings constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.



Witness my hand and seal of the said District Court this 8th day of August, 1956.

[Seal]

JOHN A. CHILDRESS,  
Clerk,

By /s/ CHARLES E. JONES,  
Deputy.

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[Endorsed]: No. 15230. United States Court of Appeals for the Ninth Circuit. Morgan Stivers, Appellant, vs. National American Insurance Company, a Corporation, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 10, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit  
No. 15230

MORGAN A. STIVERS,

Appellant,

vs.

NATIONAL AMERICAN INSURANCE CO., a  
Corporation, et al.,

Appellee.

STATEMENT OF THE POINTS ON WHICH  
APPELLANT INTENDS TO RELY

1. The evidence is insufficient to support the Findings of Fact contained in the following paragraphs of said Findings of Fact:

IIId, those portions of paragraphs IV, V, VI and VII dealing with agency relationship between plaintiff and Truman B. Stivers, X, XIV, XV, XVI, XVII and XVIII.

2. That the Conclusions of Law contained in paragraphs 1, 2, 3 and 4 are insupportable on the evidence and contrary to law.

3. That the Judgment is unsupported by the evidence and contrary to law.

Dated: August 20, 1956.

SIMPSON, WISE &  
KILPATRICK;  
HARWOOD STUMP and  
HENRY T. LOGAN,

By /s/ GEORGE E. WISE.

Affidavit of service by mail attached.

[Endorsed]: Filed August 22, 1956.